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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

JOHN CHARLES LESKO,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Where a defendant testifies about his background and personal history as a mitigating circumstance during the penalty phase of a capital trial, may the prosecutor, consistent with the Self-Incrimination Clause, comment on the defendant's failure to express remorse?

II. Did the court of appeals improperly announce a "new rule" on collateral review when it held that the Self-Incrimination Clause prohibits a prosecutor from commenting on a capital defendant's failure to express remorse while testifying at the penalty phase?

III. Where the state supreme court holds that a prosecutor's penalty phase closing argument was a proper reference to the defendant's demeanor and was neither prejudicial nor inflammatory

a. may a lower federal court determine that the challenged comment is not

a reference to demeanor and, applying the same constitutional standard, merely substitute its judgment for that of the state court and grant habeas corpus relief?

b. did the court of appeals err in holding that the argument rendered the penalty phase fundamentally unfair and that the error was not harmless?

IV. Where a counselled state prisoner failed or refused to present evidence in a State court proceeding held on the issue of the voluntariness of his guilty plea to a murder which formed the basis for an aggravating circumstance at the penalty phase of his capital trial, did the court of appeals err in holding that the petitioner had been denied a full and fair hearing in state court and in remanding the case for an evidentiary hearing in the federal district court?

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JOHN CHARLES LESKO,
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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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The Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, filed February 11, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit

reversing the order of the district court is reported at 925 F.2d 1527 (1991). A copy of the opinion is contained in Volume I of the separately bound Appendix to this petition at Appendix B. The report and recommendation of the United States magistrate denying the writ of habeas corpus which was adopted as the opinion of the United States District Court for the Western District of Pennsylvania is unreported. A copy of the report and recommendation is contained in Volume I at Appendix D. The earlier opinion of the court of appeals reversing the order of the district court granting the writ of habeas corpus and remanding the case is reported at 881 F.2d 44 (1989). A copy of that opinion is contained in Volume I at Appendix E. The earlier memorandum opinion of the district court granting the writ is reported at 689 F.Supp.

508. A copy of that opinion is contained in Volume II at Appendix F.

The memorandum opinion of the Superior Court of Pennsylvania quashing an appeal from an order denying post-conviction relief is unreported. A copy of the opinion is contained in Volume II at Appendix G. The opinion of the Indiana County Court of Common Pleas denying post-conviction relief is unreported. A copy of that opinion is contained in Volume II at Appendix H.

The per curiam order of the Supreme Court of Pennsylvania denying reargument in the appeal from the denial of post-conviction relief in Westmoreland County is reported at 509 Pa. 625, 506 A.2d 897 (1986). A copy of that order is contained in Volume II at Appendix I. The opinion of the Supreme Court of Pennsylvania affirming the denial of post-conviction relief in Westmoreland

County is reported at 509 Pa. 67, 501 A.2d 200 (1985). A copy of that opinion is included in Volume II at Appendix J. The opinion and order of the Westmoreland County Court of Common Pleas denying post-conviction relief is contained in Volume II at Appendix K.

The opinion of the Supreme Court of Pennsylvania affirming the denial of the motion to withdraw the Indiana County guilty plea is reported at 502 Pa. 511, 467 A.2d 307 (1983). A copy of that opinion is included in the Volume II at Appendix L. The opinion and order of the Indiana County Court of Common Pleas denying the motion to withdraw the guilty plea is unreported. A copy of the opinion and order is contained in Volume III at Appendix M.

The opinion of the Supreme Court of Pennsylvania affirming the first degree murder conviction and sentence of death

on direct appeal is reported at 502 Pa. 474, 467 A.2d 288 (1983). A copy of the opinion is contained in Volume III at Appendix N. The opinion and order of the Court of Common Pleas of Westmoreland County denying post-verdict motions for new trial and in arrest of judgment is unreported. A copy of the opinion and order is contained in Volume IV at Appendix O.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 11, 1991. Rehearing and rehearing in banc were denied on March 11, 1991. That order is contained in Volume I of the Appendix at Appendix A. This petition for writ of certiorari follows within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rules 13.1, 13.4. This Court's juris-

diction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person...shall be compelled in any criminal case to be a witness against himself....

U.S. Const. amend V.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> ...nor shall any State deprive any person of life, liberty or property without due process of law....

U.S. Const. amend. XIV.

Section 2254 of Title 28 provides, in pertinent part:

> (a) The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant

to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

. . .

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or an agent thereof were parties, evidenced by a written finding, written opinion or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately

> developed at the State court hearing;
>
> . . .
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court...
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) through (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent...the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(a) and (d).

STATEMENT OF THE CASE

Respondent, John Charles Lesko (hereinafter "Lesko"), and a co-defendant, Michael Travaglia, were arrested, tried and convicted in Westmoreland

County, Pennsylvania, for the murder of Police Officer Leonard Miller.

The events leading to Officer Miller's death began in the late evening of January 2, 1980. Lesko met with his co-defendant, Michael Travaglia, and one Ricky Rutherford in downtown Pittsburgh. Travaglia told Lesko and Rutherford to go behind a hotel and wait for him. Shortly thereafter Travaglia arrived in a sports car being driven by a stranger, William Nicholls. At Travaglia's direction, Lesko and Rutherford got into the car. As they were doing so, Travaglia shot Nicholls in the arm.

Travaglia directed Nicholls to drive out of the city. Travaglia then began driving. Nicholls was placed in the back seat with Lesko. Lesko ordered Rutherford to handcuff Nicholls behind the back. Lesko repeatedly punched Nicholls. He asked him to perform oral sex on him

and called him a queer. He also taunted him with a knife. He took Nicholls' personal belongings and told Rutherford to place them in the glove compartment. When Nicholls lost consciousness, Lesko gagged him with a scarf.

Travaglia drove to a wooded area near a lake. Lesko propped Nicholls against a tree. His hands were cuffed, his feet were bound with a belt, and he was gagged. Travaglia and Lesko dragged Nicholls to the lake and rolled him in.

Lesko, Travaglia and Rutherford then drove Nicholls' car to Travaglia's father's house. While Lesko and Rutherford waited, Travaglia entered the house. He returned with a handgun which he handed to Lesko. When he inspected it he realized that it only had bird shot in it. Travaglia drove back to the house and told Rutherford where he could find bullets in his father's car which

was parked in the garage. Rutherford and Lesko exited the car. Lesko was armed with the gun which had been used by Travaglia to shoot Nicholls. He told Rutherford that if anything happened he "had six shots to get out." Rutherford retrieved the bullets and returned with Lesko to the car. Officer Miller was killed with these bullets.

After driving a while they saw Officer Miller parked near a convenience store. Travaglia said he "wanted to have some fun with this cop." He sped past the officer and beeped. The officer did not pursue. He again drove past and again the officer failed to respond. The third time Travaglia went past the officer he beeped and ran a red light. Officer Miller gave chase with his lights flashing. During the chase Lesko told Rutherford "to lay down in the back,

because it might turn into a shooting gallery."

After a brief chase Travaglia stopped the car and rolled down the window. As Officer Miller approached on foot Travaglia shot him twice with the gun which he and Lesko obtained from his father's house. After Officer Miller returned fire the trio sped away. They eventually returned to Pittsburgh.

Later that day Travaglia and Lesko met a friend, Daniel Keith Montgomery. Travaglia told him, "I shot a cop." Lesko said, "I wanted to" and laughed. Travaglia gave Montgomery the gun he used to shoot Officer Miller. Montgomery later gave it to the police and told them it had been used to kill a police officer.

That night, Lesko and Travaglia were arrested in a hotel room. Before surrendering, Lesko pointed a gun at the

police. They both gave statements admitting involvement in Officer Miller's killing. Lesko said they tried to draw the officer's attention away from the convenience store so that they could return and "knock off" the store. Lesko and Travaglia also implicated themselves in the Nicholls' homicide, as well as the homicides of Peter LeVato and Marlene Sue Newcomer.[1] The officer who took the statement testified, without objection, that during the interview Lesko never expressed any remorse, regret or sorrow for what had happened.

Both defendants contended at trial that they lacked the intent to kill, a requisite to first degree murder, the only capital offense in Pennsylvania. Lesko's counsel argued, based on Lesko's

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[1]Only the portion of the statements concerning the Miller homicide were introduced at trial.

statement,[2] that they planned to rob the store. The killing, he argued, was not premeditated. It was the unintended result of a botched robbery attempt. He contended that Lesko was guilty of only second degree, felony murder. The prosecution argued that the killing of Officer Miller constituted murder of the first degree.

Lesko and his co-defendant were each found guilty of murder of the first degree and conspiracy. The trial then proceeded to the penalty phase in conformity with Pennsylvania's statute. The record from the guilt phase was incorporated for purposes of the penalty phase. The Commonwealth also introduced evidence of two statutory aggravating circumstances: (1) that Officer Miller

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[2]Neither Lesko nor Travaglia testified at trial.

was killed in the performance of his duties, 42 Pa.Cons.Stat.Ann. § 9711(d)(1)(Purdon 1982); and (2) that Lesko had pleaded guilty to the crime of second degree murder in the Nicholls case for which a sentence of life imprisonment was imposable, 42 Pa.Cons.Stat.Ann. § 9711(d)(10)(Purdon 1982). The defense objected to the evidence related to the plea arguing, inter alia, that the Indiana prosecutor had agreed that the plea could not be used as an aggravating circumstance. The objection was overruled.

In an attempt to establish mitigating circumstances, Lesko introduced evidence, including his own testimony, concerning his personal history. 42 Pa.Cons.Stat.Ann. § 9711(e)(8)(Purdon 1982). His counsel argued that there was no rational reason for or purpose served by the death penalty and that the

testimony concerning Lesko's character and personal history was an important mitigating circumstance.

In his closing argument the prosecutor argued forcefully for the death penalty under the facts and circumstances of the case. He began his argument by reading the pertinent portion of the death penalty statute and describing the jury's function in determining if the evidence supported any aggravating or mitigating circumstances. After responding to defense counsel's Biblical arguments, the prosecutor reviewed the evidence supporting the aggravating circumstances. He then recounted the evidence offered to establish mitigating circumstances, arguing generally that they had not been established by a preponderance of the evidence but conceding that one might apply to Lesko. Responding to the "character"

argument made on Lesko's behalf, the prosecutor argued:

> Good character and record. All of the character witnesses limited their testimony to a certain period of time...We heard about John Lesko up to a certain point.
>
> And I want you to consider that John Lesko took the witness stand and you've got to consider his arrogance. He told you about how rough it was, how he lived in hell, and he didn't even have the common decency to say I'm sorry for what I said. I don't want you to put me to death but I'm not even going to say I'm sorry.

Appendix B, at 28a-29a.

The prosecutor then responded to the defense contentions that the death penalty was not a deterrent and that it constituted cruel and unusual punishment.

The prosecutor ended his summation by returning to his opening theme of applying the statute and imposing the death penalty because the aggravating

circumstances outweighed the mitigating. He said:

> Show them sympathy. If you feel that way, be sympathetic. Exhibit the same sympathy that was exhibited by these men on January 3rd, 1980. No more. No more.
>
> I want you to remember this: We have a death penalty for a reason. Right now, the score is John Lesko and Michael Travaglia two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's your duty.

Appendix B, at 29a.

The defense objected to portions of the prosecutor's argument asserting that it constituted an impermissible appeal to vengeance and that it improperly commented on Lesko's failure to express remorse in violation of the Due Process and Self Incrimination Clauses. The trial court rejected both assertions. In its charge, the trial court did instruct the jury, however, that it was up to each defendant whether to testify and

that no adverse inference could be drawn from the fact that a defendant did not testify.

The jury was instructed in conformity with Pennsylvania's death penalty statute and returned sentences of death for both Lesko and his co-defendant. As to each, the jury unanimously found that both proffered aggravating circumstances were proven and that the aggravating circumstances outweighed all mitigating circumstances.

Lesko had previously pleaded guilty in Indiana County, Pennsylvania, to the crime of second degree, felony murder for the drowning death of William Nicholls. The mandatory sentence for second degree murder is life imprisonment. 18 Pa.Cons. Stat.Ann. § 1102(b)(Purdon 1983).

Shortly before the commencement of trial in this case, Lesko, through Indiana County counsel, John Armstrong,

Esquire, filed a motion to withdraw his guilty plea asserting a variety of grounds. After he was convicted and sentenced to death for his part in the murder of Officer Miller, Lesko, through Armstrong, amended this motion. He alleged that his plea agreement had been breached and that his guilty plea had been rendered involuntary as a result of its introduction as an aggravating circumstance in the penalty phase of the Westmoreland County trial.

The Indiana County court conducted a hearing on Lesko's amended motion. Armstrong presented no testimony. However, he explained that he placed the full plea agreement on the record during the plea colloquy at which Lesko and the Indiana County prosecutor assented to the completeness of Armstrong's recitation of its terms. Armstrong told the judge that the express agreement as set

forth at the plea proceeding carried with it an implied agreement that the plea would not be used as an aggravating circumstance during the sentencing proceeding. The Indiana County prosecutor testified and denied that there was any agreement of non-use, express or implied.

The Indiana County court denied the motion finding as facts that Lesko's plea was "voluntarily...entered" and that there was no condition of non-use in the plea agreement. Appendix M, at 338a-341a. The trial court made this determination based upon a review of the guilty plea colloquy, the testimony of the prosecutor, and the lack of any credible evidence to the contrary from Lesko. The trial court concluded that if there was any such agreement it would have been stated on the record. Id., at 341a.

Lesko appealed from the imposition of the sentence of death resulting from Officer Miller's killing in Westmoreland County (hereinafter "the Westmoreland County appeal"). He also appealed from the sentence of life imprisonment imposed after denial of the motion to withdraw his guilty plea in the Nicholls homicide (hereinafter "the Indiana County appeal"). The Supreme Court of Pennsylvania decided both of these appeals on the same day and rejected all of Lesko's claims.

In the Westmoreland County appeal, the Supreme Court determined, inter alia, that Lesko's plea of guilty was properly admitted to establish an aggravating circumstance during the penalty phase of the trial. Appendix N, at 397a-404a. The court also rejected all of Lesko's claims that the prosecutor engaged in improper argument during the

sentencing proceeding. Id., at 404a-417a.

The court determined that the prosecutor's comment on Lesko's failure to show remorse during his testimony at the penalty proceeding did not run afoul of his privilege against self-incrimination. The court opined that the privilege, in its pure form, has no direct application to a determination of the proper sentence to be imposed. Id., at 404a-409a.

The court held that the demeanor of a convicted defendant, including his apparent remorse, is a proper consideration in fixing sentence in a capital case. Id., at 408a-409a. Moreover, the trial court instructed the jury, within minutes after the prosecutor's argument, that the defendants had no obligation to testify and that the jury could draw no adverse inference from the failure to testify. Id., at 409a. Accordingly, the

Supreme Court found no error in this comment.

The court also rejected Lesko's claim that the prosecutor's argument that: "Right now, the score is John Lesko and Michael Travaglia two society nothing" and that it was the jury's duty to make the killing stop was an improper appeal to vengeance. The court determined that this argument was proper response to arguments made by the defense counsel. Taken in context, the Supreme Court held that the comment was permissible oratorical flair. Id., at 416a-417a.

In the Indiana County appeal, the court held that Armstrong's counsel in advising Lesko to plead guilty was not constitutionally ineffective. By extracting an agreement from the Indiana County prosecutor to delay the imposition of the mandatory sentence of life imprisonment on the plea to second degree

murder until after the Westmoreland County trial, he was trying to avoid the certainty that a conviction and sentence for the Nicholls murder would be used as an aggravating circumstance during the penalty phase. Appendix L, at 318a-325a.

The court also rejected Lesko's claim that his plea agreement had been breached by the use of the plea as proof of an aggravating circumstance. After examining the record, the court affirmed the trial court's finding that there was no agreement of non-use. Id., at 327a-328a.

After this Court denied certiorari in the Westmoreland County appeal, 467 U.S. 1256 (1984), Lesko collaterally attacked his death sentence by filing a petition under the Post Conviction Hearing Act (P.C.H.A). In that petition Lesko, through counsel, sought a hearing to present evidence on his claim that

his plea agreement had been breached by the introduction of his plea during the penalty phase. At the P.C.H.A. hearing, he proffered Armstrong's testimony. His attorneys said that Armstrong would testify that it was understood between the Indiana County prosecutor and him that the plea would not be introduced at the penalty phase and that Armstrong conveyed that understanding to Lesko as the essence of the plea agreement. The Commonwealth objected to this testimony on the basis that the issue, the terms of the plea agreement and the alleged breach, had been finally litigated during the Indiana County appeal. The Westmoreland County court agreed and refused to allow the testimony. Appendix K, at 301a-302a and 304a-306a. Lesko was denied relief on all his claims and appealed.

The Supreme Court affirmed. Appendix J. The court first decided that the question had been determined adversely to Lesko in the Indiana County appeal and was, therefore, finally litigated. Id., at 267a-277a.[3] The court, nonetheless, reexamined the merits of the claim and rejected it. Id., at 277a-289a. This Court thereafter denied certiorari. 479 U.S. 1101 (1987).

After the hearing on the P.C.H.A. petition in Westmoreland County at which Armstrong's testimony was proffered, Lesko filed a pro se P.C.H.A. petition in Indiana County. He claimed, inter alia, that Armstrong rendered ineffective assistance of counsel in that he miscommunicated the terms of the plea

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[3]Such a finding barred P.C.H.A. relief. See 42 Pa.Cons.Stat.Ann. § 9544 (a)(3)(Purdon 1982) repealed and replaced by 42 Pa.Cons.Stat.Ann. §§ 9541 et seq. (Purdon Supp. 1990).

agreement. The same judge who had presided at the guilty plea colloquy and at the hearing on the amended motion to withdraw the plea denied the petition without a hearing. After reciting the terms of the plea agreement, he observed that it was Armstrong's strategy to delay imposition of sentence on the plea so that it would not be used as an aggravating circumstance in Westmoreland County. During the plea colloquy, the judge made sure that Lesko understood the plea agreement and that he entered into it willingly. The judge observed that the Supreme Court had ruled in the Indiana County appeal that Armstrong's advice had been reasonable, that he was not ineffective, that there was no breach of the agreement, and that Lesko knew its exact nature. Accordingly, he determined that Lesko's claim had been

finally litigated and could not be relitigated. Appendix H.

After his Indiana County P.C.H.A. petition was denied Lesko sought reconsideration. In his reconsideration motion he proffered that both he and Armstrong would testify that one of the material terms of the plea agreement upon which the plea was entered was that the plea would not be introduced at the Westmoreland County trial. The motion was denied and Lesko filed an appeal pro se. Thereafter, counsel was appointed to represent Lesko on his appeal.

In his brief filed in the appellate court, counsel argued that Lesko should have been given a hearing on his petition so that he could testify about his understanding of the plea agreement. He also argued that Armstrong was incompetent in his explanation of the agreement to Lesko and that he misled Lesko

into pleading guilty. The Superior Court quashed the appeal sua sponte because it was not filed in a timely fashion. Appendix G.

Lesko's appellate counsel sought discretionary review of that order by filing a petition for allowance of appeal with the Supreme Court. He asked that court to disregard the procedural default and to address the merits of Lesko's claim. He also asked the court to reconsider its earlier opinion in the Indiana County appeal because it did not have the benefit of an evidentiary hearing which addressed the issue of the plea bargain between Lesko and the Indiana County prosecutor. The Supreme Court denied the petition for allowance of appeal without further explanation. 357 Pa.Super. 636, 513 A.2d 1077 (1986).

During the pendency of Lesko's second petition for writ of certiorari,

Lesko filed a counselled petition for writ of habeas corpus in the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. § 2254. Lesko's petition alleged eighteen violations of his rights secured by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In his petition, Lesko claimed, inter alia, that the admission of his guilty plea as an aggravating circumstance at his death penalty trial violated his Indiana County plea agreement and denied him due process of law. He asserted that he was entitled to an evidentiary hearing on this claim because the fact finding procedure in state court did not afford him a full and fair hearing and because the material facts were not adequately developed at the state court hearing. Respondents (petitioners herein) objected

to the request for an evidentiary hearing on the basis that the terms of the plea agreement had been determined adverse to Lesko in the Indiana County appeal and the appeal from the Westmoreland County court's denial of P.C.H.A. relief.[4]

The district court issued a conditional writ finding that Lesko had been denied due process by the introduction, during the guilt phase of the proceedings, of evidence surrounding the Nicholls homicide. Appendix F. Because of its disposition on that issue, the district court did not address the other claims raised by Lesko. Id., at 199a.

On appeal by Respondents (Petitioners herein) the United States Court

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[4]At the time that this issue was originally briefed for the district court, petitioners herein were unaware of the opinion of the Indiana County judge denying P.C.H.A. relief who also found that the issue had been finally litigated.

of Appeals for the Third Circuit reversed the decision of the district court and remanded the matter for consideration of the remaining claims raised in the petition. Appendix E. This Court thereafter denied Lesko's third petition for writ of certiorari. 110 S.Ct. 759 (1990).

Upon remand, the district court referred the matter to a United States magistrate. The magistrate recommended that the petition be dismissed but that a certificate of probable cause to appeal be granted. Appendix D, at 68a.

In rejecting Lesko's claims that his plea agreement was violated by the use of his guilty plea during the penalty phase of the Westmoreland County trial and that he was entitled to a hearing on that issue in federal court, the magistrate noted Lesko's argument that it was necessary to consider not only the ex-

press terms of the agreement but also the implicit understanding of the parties and, most importantly, any representations concerning the agreement made to Lesko by his attorney. He determined that the terms of the agreement had been considered by the Indiana County court at the hearing on Lesko's amended motion to withdraw his plea and by the Supreme Court on the appeal from the order denying the motion. Likewise, the issue was considered by the Westmoreland Court as part of the P.C.H.A. petition and again by the Supreme Court on the appeal from the order denying the petition. He held that the factual conclusion by the trial and appellate courts that there was no agreement that the plea could not be used as an aggravating circumstance was entitled to a presumption of correctness which Lesko had not rebutted.

The magistrate concluded that there was a full record on the issue from the guilty plea colloquy and the hearing on the motion to withdraw the plea. He observed that, while plea counsel was unavailable to testify at the hearing on the motion (because he was representing Lesko at the hearing), counsel's representations that there was such an agreement were heard by both the Indiana County court and the Supreme Court and rejected. Accordingly, the magistrate recommended that a further hearing was not necessary. Id., at 77a-85a.

Turning to Lesko's claims concerning the prosecutor's closing argument during the penalty phase the magistrate determined that, in context, the "two-to-nothing" comment did not work a denial of due process and render the proceeding unfair. The comment was a response to the emotional attacks made on the

death penalty by defense counsel. Id., at 87a-90a.

Concerning the prosecutor's comment that when Lesko testified during the penalty phase he failed to show remorse, the magistrate initially opined that the comments were not directed at Lesko's failure to testify and thus were not in violation of the Fifth Amendment. Instead, the magistrate found that they were directed at Lesko's plea for leniency. He concluded that any possible prejudice resulting from these comments was mitigated by the trial court's instructions which explained that a criminal defendant has no obligation to testify. Id., at 90a-93a.

The district court adopted the report and recommendations of the magistrate as its opinion, dismissed the habeas corpus petition, and issued a

certificate of probable cause. Appendix C. Lesko, through counsel, appealed.

The United States Court of Appeals for the Third Circuit reversed the judgment of the district court to the extent that it sustained the imposition of the death penalty. Appendix B. The court of appeals held that the prosecutor's comment on Lesko's failure to express remorse during his testimony at the penalty proceeding infringed on his Fifth Amendment privilege against self-incrimination. The appeals court determined that the rule of Griffin v. California, 380 U.S. 609 (1965), is applicable to both the guilt and penalty phases of a death penalty trial. It found this conclusion mandated by Estelle v. Smith, 451 U.S. 454 (1981). Id., at 31-32a.

The court also ruled that Lesko did not waive the privilege by testifying about his background during the senten-

cing proceeding. This testimony was "collateral" according to the court. Id., at 34a-35a. In making this pronouncement the court determined that it was not announcing a new rule on habeas corpus review but was applying law which was well-established at the time of Lesko's trial. Id. The court of appeals determined that the prosecutor's remark was not merely a reference of Lesko's demeanor as a witness in his own behalf. Id., at 37a-38a.

The court of appeals also determined that the prosecutor's "two-to-nothing" comment and his imploring the jury that it was their duty to make the killing stop was an impermissible appeal to vengeance. Id., at 39a-42a. When coupled with the "no remorse" comment, Lesko was denied due process, according to the appeals court. Id., at 42a. Despite the trial court's cautionary instruc-

tions concerning a defendant's failure to testify, the court of appeals decided that these constitutional errors were not harmless. Id., at 42a-44a.

The court of appeals also held that, before the Indiana County guilty plea could be used as an aggravating circumstance at a new penalty hearing, Lesko was entitled to an evidentiary hearing, in federal court, on his claim that he pleaded guilty with the understanding that the plea could not be used in the Westmoreland County trial. Id., at 28a. The court concluded that the merits of this claim were never resolved in the state courts and that the presumption of correctness was, therefore, inapplicable. Id., at 27a- 28a.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals conflicts with decisions of other courts

of appeals on the same matter and with decisions of state courts of last resort. It also conflicts with applicable decisions of this Court. In addition, the decision has so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's supervisory power. Accordingly, the writ should issue and the judgment of the court of appeals should be reversed.

1. Generally, it has been held that a defendant's lack of remorse is a relevant consideration during the penalty phase of a capital trial. Commonwealth v. Lesko, 502 Pa. 474, 467 A.2d 288 (1983), cert. denied sub nom. Lesko v. Pennsylvania, 467 U.S. 1256 (1984) (instant case on direct appeal); State v. Price, 326 N.C. 56, 388 S.E.2d 84 (1990) (relates to demeanor observable at trial); State v. Wickline, 50 Ohio

St. 114, 552 N.E.2d 913 (1990), cert. denied, 112 L.Ed.2d 235 (1990) (shows aggravating circumstances outweigh mitigating); People v. Ghent, 43 Cal.3d 739, 239 Cal.Rptr. 82, 739 P.2d 1250 (1987), cert. denied, 485 U.S. 929 (1988) (demonstrates absence of mitigation); Agan v. State, 445 So.2d 326 (Fla. 1983), cert. denied, 469 U.S. 873 (1984) (negates mitigation); Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), cert. denied, 444 U.S. 1049 (1979) (relevant to future dangerousness). See also Gaskins v. McKellar, 916 F.2d 941 (4th Cir. 1990) (relevant to aggravating circumstances); Russell v. Lynaugh, 892 F.2d 1205 (5th Cir. 1989) (could justify death penalty); Harris v. Pulley, 885 F.2d 1354 (9th Cir. 1988), cert. denied, 110 S.Ct. 854 (1990) (relevant to capital sentence); Coleman v. Brown, 802 F.2d 1227 (10th

Cir. 1986), cert. denied, 482 U.S. 909 (1987) (relevant to aggravating circumstance).

Several courts have permitted a prosecutor's comment during the penalty phase on a defendant's lack of remorse, whether or not the defendant has testified. Commonwealth v. Lesko, supra; Commonwealth v. Chester, ___ Pa. ____, 587 A.2d 1367 (1991) (defendant did not testify); State v. Price, supra (same); State v. Wickline, supra (unclear); State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated on other grounds, 108 L.Ed.2d 604 (1990) (defendant testified at guilt phase); People v. Barrows, 133 Ill.2d 226, 139 Ill. Dec. 728, 549 N.E.2d 240 (1989), cert. denied, 111 L.Ed.2d 832 (1990) (defendant did not testify); People v. Carrera, 49 Cal.3d 391, 261 Cal.Rptr. 348, 777 P.2d 121 (1989), cert. denied, 110 S.Ct. 1938

(1990) (defendant testified); Commonwealth v. Holland, 518 Pa. 405, 543 A.2d 1068 (1988) (defendant did not testify); State v. Brown, 320 N.C. 179, 358 S.Ed.2d 1 (1987), cert. denied, 484 U.S. 970 (1987) (same); People v. Ghent, supra (defendant testified at special circumstances hearing). But see People v. Bell, 49 Cal.3d 502, 262 Cal. Rptr. 1, 778 P.2d 129 (1989), cert. denied, 110 S.Ct. 2576 (1990) (comment improper where defendant did not admit responsibility or invite comment; dicta).

The court of appeals concluded that the prosecutor's "no remorse" comment during the penalty phase of Lesko's trial violated the rule announced in Griffin v. California, 380 U.S. 609 (1965) (Self-Incrimination Clause violated by prosecutor's argument that a defendant's failure to testify at the guilt phase of a capital trial could be

considered against him). According to the court of appeals, this conclusion was mandated by Estelle v. Smith, 451 U.S. 454 (1981). In Smith, the Court held that the privilege against compelled self-incrimination was violated when the state used the defendant's statement to a court-appointed psychiatrist at the sentencing phase of a capital trial to prove the defendant's future dangerousness, where the statement had not been preceded by Miranda warnings.

In deciding this issue, the court of appeals gave an expansive reading to Estelle v. Smith, supra, ignoring the limitation the Court placed on its holding ("[i]n these distinct circumstances, the Court of Appeals correctly concluded that the Fifth Amendment privilege was implicated"). Id. at 466 (emphasis added). The court of appeals also ignored the rationale of Griffin in

applying it to the penalty phase of a capital trial.

In Griffin, the Court was intent on protecting "the presumption of innocence." Id. at 613, quoting Wilson v. United States, 149 U.S. 60, 66 (1893). At the penalty phase of a capital trial, the defendant has already been stripped of that presumption. He has been adjudged guilty of a capital offense. See Commonwealth v. Lesko, supra, at 499, 467 A.2d at 300 ("...the privilege against self-incrimination in its pure form has no direct application to a determination of the proper sentence to be imposed; the purpose of the prosecutor is not to 'incriminate,' and the goal of the defendant is not to avoid 'incrimination.' Likewise, the presumption of innocence which accompanies the accused throughout the proceedings to determine his guilt has no direct

application to the sentencing determination").[5]

Other state and federal courts have determined, in a variety of contexts, that a prosecutor's comments during argument at the penalty phase of a capital trial concerning a defendant's lack of remorse are not improper comments on the defendant's failure to testify. People v. Pensinger, 52 Cal.3d 1210, 278

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[5]It is recognized that in Smith this Court rejected the argument that "'incrimination is complete once guilt has been adjudicated,' and, therefore, the Fifth Amendment privilege has no relevance to the penalty phase of a capital murder trial." 451 U.S. at 462. In Smith, the state used the defendant's Miranda-violative statement to carry its burden of proving the defendant's future dangerousness. Here, Lesko voluntarily testified at the sentencing proceeding concerning his character and background. His lawyer said this was an important mitigating circumstance. The prosecutor argued that his failure to express remorse negated this circumstance. He did not argue that his failure to express remorse was an aggravating circumstance which would subject Lesko to the death penalty.

Cal.Rept. 640, ___ P.2d ___ (1991); State v. Price, supra (argument did not exploit defendant's silence at trial or his unwillingness to admit guilt); People v. Jackson, 49 Cal.3d 1170, 264 Cal.Rptr. 852, 783 P.2d 211 (1989), cert. denied, 111 S.Ct. 226 (1990) (comment did not refer directly or indirectly to defendant's effort to maintain innocence); Commonwealth v. Holland, supra (rejecting claim based on holding in supreme court's decision in the instant case). See also Gaskins v. McKellar, supra (in context, not an improper comment on defendant's refusal to testify at guilt phase).

Some courts have expressly considered the applicability of Griffin to a prosecutor's penalty phase comment that a capital defendant lacks remorse. For the most part, those courts assume the applicability of Griffin to penalty

phase arguments without further elaboration. In People v. Beardslee, 53 Cal.3d 68, ___ Cal. Rptr. _____, ___ P.2d ___ (1991), the defendant did not testify at the penalty phase. Based on the defendant's confession, the prosecutor argued a lack of remorse. The court rejected a Griffin challenge. In People v. Thompson, 45 Cal.3d 86, 246 Cal.Rptr. 245, 753 P.2d 37 (1988), cert. denied, 488 U.S. 960 (1988), the court said that it would be improper for a prosecutor to suggest that the jury draw an adverse inference from a defendant's exercise of his right not to testify, citing Griffin and Smith. The court held, however, that the reference to lack of remorse was permissible to the extent it negated mitigating evidence. See also People v. Keenan, 46 Cal.3d 478, 250 Cal.Rptr. 550, 758 P.2d 1081 (1988), cert. denied, 104 L.Ed.2d

169 (1989) (same); People v. Ghent, supra (same; if there was Griffin error it was harmless); People v. Williams, 44 Cal.3d 883, 245 Cal. Rptr. 336, 751 P.2d 395 (1988), cert. denied, 109 S.Ct. 249 (1988) (same; no Griffin error where prosecutor neither directly nor indirectly calls jury's attention to defendant's failure to testify).

The Supreme Court of Washington has suggested that the rule of Griffin may not apply to the penalty phase of a capital trial. See State v. Jeffries, 105 Wash.2d 398, 717 P.2d 722 (1986), cert. denied, 479 U.S. 922 (1986). But see People v. Ramirez, 98 Ill.2d 439, 75 Ill.Dec. 241, 457 N.E.2d 31 (1983), cert. denied, 481 U.S. 1053 (1987) (under Griffin and Smith, a defendant who does not testify at the penalty phase is entitled to an instruction that his silence cannot be used against him).

In Walton v. Arizona, 110 S.Ct. 3047 (1990), a plurality of the Court determined that the Constitution permitted placing the burden of proving mitigating circumstances by a preponderance of the evidence upon a defendant. In deciding the instant case on direct appeal the state supreme court stated likewise.[6] A determination that the Fifth Amendment privilege against compelled self-incrimination precludes a prosecutor from arguing that the defendant in a capital case has failed to meet his burden is inconsistent with the rule announced in Walton and will have a substantial impact on capital sentencing schemes throughout the country.

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[6]Relying on Walton, the court of appeals found no constitutional problem in this allocation of the burden of proof, 925 F.2d at 1553-54 (Appendix B, at 60a-61a).

This Court should issue a writ of certiorari in order to examine the Fifth Amendment implications of a prosecutor's remarks on a convicted murderer's lack of remorse as it relates to mitigating evidence based on his testimony.

2. The writ should issue, as well, to determine if the court of appeals improperly announced a "new rule" on collateral review when it concluded that the Griffin rule applies to argument during the penalty phase of a capital trial.

As noted above, several state and federal courts have upheld the propriety of comments similar to those at issue here despite Griffin.[7] Griffin itself

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[7]Indeed, the Pennsylvania Supreme Court continues to rely on its first opinion in the case sub judice for the proposition that remorse is a proper consideration in capital sentencing and that a prosecutor's comments on lack of remorse were not (footnote continued)

does "not speak directly, if at all, to the issue presented here," Saffle v. Parks, 110 S.Ct. 1257, 1261 (1990). Griffin was concerned with adverse comment during the guilt phase of a capital trial. The penalty phase presents different considerations.[8] Estelle v. Smith, supra, while it found a violation of the privilege against compelled self-incrimination in the penalty phase of a capital trial, was bound to its "distinct circumstances." Id. at 466. No one could clearly say that Smith applied to

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[7](Contd.)error. Commonwealth v. Chester, ___ Pa. ____, 587 A.2d 1367 (1991) (decided after the court of appeal's decision in this case).

[8]The court of appeals' reliance on Calloway v. Wainwright, 409 F.2d 59 (5th Cir. 1969), cert. denied, 395 U.S. 909 (1969), does not save this case from the Court's holdings in Teague and its progeny. A "collateral" testimony rule created by a panel of a court of appeals is not "well established" for Teague purposes.

a prosecutor's "no remorse" comment after a capital defendant voluntarily testifies at the penalty phase of a capital trial in an attempt to establish mitigating circumstances based on his background and character. In rejecting a similar challenge, the Eleventh Circuit determined that neither Griffin nor Smith resolved the issue. Tucker v. Francis, 723 F.2d 1504, 1509-10 (11th Cir. 1984), aff'd. sub nom. Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986).

Announcing this rule on collateral review is contrary to this Court's holdings in Teague v. Lane, 489 U.S. 288 (1989), Butler v. McKellar, 110 S.Ct. 1212 (1990), Saffle v. Parks, 110 S.Ct. 1257 (1990), and Sawyer v. Smith, 110 S.Ct. 2822 (1990). This new rule is within neither of Teague's exceptions.

Butler v. McKellar, supra, at 1216; Sawyer v. Smith, supra, at 2832. The rule announced by the court of appeals is not an "absolute prerequisite to fundamental fairness." Id. Indeed, this Court "has noted that the fifth amendment privilege against adverse comment on silence 'has little to do with fair trial and derogates rather than improves the chances for accurate decisions. Baxter v. Palmigiano, 425 U.S. 308, 319, 96 S.Ct. 1551, 1558 (1976)." Tucker v. Francis, supra, at 1516.

The announcement of this new rule concerning prosecutor's arguments during capital sentencing proceedings has departed from the role of the federal courts in habeas corpus proceedings. This departure, as it calls into question the finality of capital cases after

affirmance on direct review, calls for the exercise of this Court's supervisory power. The writ should issue.

3. The court of appeals' holding that the prosecutor's argument at the penalty phase was improper and rendered the proceeding fundamentally unfair also requires this Court to exercise its supervisory responsibility. On direct review, the Supreme Court of Pennsylvania examined these claims and rejected them. It found that the "no remorse" comment was a proper reference to Lesko's demeanor and was not prejudicial. Appendix N, at 405a-409a. It found that the alleged "appeal to vengeance" was not "inflammatory." Id., at 416a. The court of appeals, reviewing the same facts and applying the same legal standard, found the proceeding fundamentally unfair requiring habeas corpus relief.

In resolving this issue, the court of appeals presumed to apply the standard established by this Court in Donnelly v. DeChristoforo, 416 U.S. 637 (1974). It is clear that the state court applied the same standard in rejecting these arguments, though not couched in terms of a denial of due process. The standard, therefore, appears to be no standard at all.

The appeals court rejected the state supreme court's determination that the "no remorse" comment was a reference to Lesko's demeanor. Appendix B, at 37a-38a. It recognized that, standing alone, the alleged "appeal to vengeance" would not warrant relief under DeChristoforo. Id., at 42a. It held, however, that the combined impact of the Griffin error (which it found) along with the "improper" appeal to vengeance required relief. Id., at 42a and 44a.

In resolving an issue, it is clear that the federal court can grant habeas corpus relief when the state court applies an incorrect legal standard or misapplies the correct legal standard. The same should not be true where the correct standard was properly applied, even if the federal court disagrees with the result. The role of the lower federal courts in administering the writ of habeas corpus is to protect basic rights. They do not sit to review the decisions of the state courts. Allowing such a practice undermines finality and comity. See McCleskey v. Zant, 59 U.S. L.W. 4288 (1991).

This death penalty case gives this Court the opportunity to reevaluate the role of the lower federal courts in reviewing the decisions of the state courts which are bound to the application of the state law and the facts of

the particular case. The writ should issue.[9]

Assuming, arguendo, that the court of appeals properly examined this issue, it erred in determining that the argument rendered the proceeding fundamentally unfair in violation of the Due Process Clause. The argument did not warrant relief under Donnelly v. DeChristoforo, supra. The court below erred, as well, in determining that, in light of the trial court's instructions, the complained of argument was not harmless beyond a reasonable doubt. See Boyde v. California, 110 S.Ct. 1190, 1200 (1990). For these reasons, too, the writ should issue.

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[9]It should not go unnoticed that "the Court of Appeals reached a conclusion which was in conflict with the conclusion reached by every other state and federal judge after reviewing the exact same record." Sumner v. Mata, 449 U.S. 539, 548-49 (1981).

4. Lastly, this Court should review the court of appeals' decision remanding this case to the district court for an evidentiary hearing on the issue of the voluntariness of Lesko's guilty plea in Indiana County. Lesko raised this issue in state court in his amended motion to withdraw his Indiana County guilty plea. He clearly had the opportunity to present all his proofs on that claim at the hearing on the motion. His counsel did not present testimony on his involuntariness claim based on the allegedly breached plea agreement. Instead, he provided legal argument. The Commonwealth introduced testimony to refute the claim of a breached agreement which was credited by the Indiana County court. Appendix M, at 340a-341a. That court rejected the claim finding the plea to be voluntary. Id., at 338a and 339a. The state supreme court affirmed

after reviewing the record and the arguments of plea counsel. Appendix L, at 328a.

The "proofs" which Lesko now wishes to present to the federal district court were available to him at the time of the hearing on the motion to withdraw his guilty plea. Both he and his counsel could have testified at the hearing.[10] Other witnesses, belatedly identified by plea counsel in the affidavit filed at the direction of the court of appeals, were available and could have testified as well. If the evidence crucial to the consideration of Lesko's claim was not developed at the hearing on the motion

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[10]His counsel gave the equivalent of testimony in his arguments before the motion court and the supreme court. Despite his continued representation of Lesko at the hearing on the motion, he could have testified at the hearing by the simple expedient of securing additional counsel for purposes of questioning him at the hearing.

it was due to his "inexcusable neglect. "Townsend v. Sain, 372 U.S. 293, 317 (1963).

This Court recently addressed the concept of "inexcusable neglect" in the context of abuse of the writ. McCleskey v. Zant, 59 U.S.L.W. 4288 (1991). The term "inexcusable neglect" was taken from the Court's opinion in Townsend, supra. Townsend addressed the question of when a federal court must hold an evidentiary hearing on a state prisoner's habeas corpus petition. The Townsend court said that the inexcusable neglect standard "does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures." Id., at 317.

In McCleskey, supra, the Court noted "the imprecise contours of the term 'inexcusable neglect.'" Id., at 4296.

It determined "that the [cause and prejudice] standard used to determine whether to excuse state procedural defaults should govern the determination of inexcusable neglect in the abuse of the writ context." Id. at 4294.

It appears that a hearing is not required in the federal court if the state prisoner deliberately by-passes state procedures. See Townsend v. Sain, 372 U.S. at 317 and compare Vasquez v. Hillary, 474 U.S. 254, 260 (1986) ("the circumstances present no occasion for the Court to consider a case in which the prisoner has attempted to expedite review by deliberately witholding essential facts from the state courts"). Some courts of appeals have apparently limited the Townsend concept of "inexcusable neglect" to "deliberate by-pass." See Smith v. Freeman, 892 F.2d 331, 340 (3d Cir. 1990) (relied on by the court

below); and Streetman v. Lynaugh, 812 F.2d 950, 960 (5th Cir. 1987) ("[i]t is well established that counsel's failure to marshall crucial evidence underlying a federal claim because of insufficient preparation or other neglect does not constitute a deliberate by-pass" under Townsend).

The instant case gives the Court the opportunity to clarify the "inexcusable neglect" standard as it relates to a habeas petitioner's failure or refusal to present all the facts supporting a claim for relief to the state courts in light of the recent decision in McCleskey. The same policies of comity, finality and federalism which underscore the abuse of the writ and procedural default rules apply here. The writ should issue.

CONCLUSION

For the foregoing reasons, we respectfully request that the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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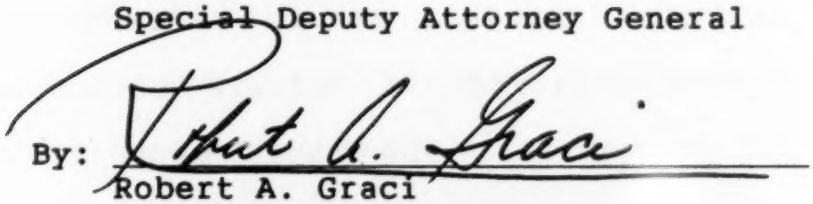
By: 
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Dated: June 5, 1991

90-1880

Supreme Court, U.S.
FILED
JUN 7 1991
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

JOHN CHARLES LESKO,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
VOLUME I

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3295

JOHN CHARLES LESKO,
Respondent

vs.

JOSEPH LEHMAN, et al.
Petitioners

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO and HIGGENBOTHAM, Circuit Judges.

The petition for rehearing filed by petitioners in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of

the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

March 11, 1991

* Senior Judge Higginbotham voted only as to panel rehearing.

APPENDIX B

Filed February 11, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3295

JOHN CHARLES LESKO,

Appellant

v.

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Appellees.

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civil Action No. 86-01238)

Argued October 10, 1990

Before: HIGGINBOTHAM, MANSMANN and COWEN, *Circuit Judges*.

(Filed February 11, 1991)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*.

Appellant John Charles Lesko was convicted and sentenced to death by the Westmoreland County Court of Common Pleas for the murder of Leonard Miller, an officer of the Apollo, Pennsylvania police department. This is the second appeal involving Lesko's petition for a writ of habeas corpus. On

July 27, 1989, we reversed the district court's issuance of the writ, holding that Lesko was not deprived of a fair trial by the introduction at trial of evidence of his role in the prior murder of William Nicholls. We remanded for consideration of Lesko's other habeas claims. *Lesko v. Owens*, 881 F.2d 44 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 759 (1990). On remand, the district court dismissed Lesko's habeas petition after considering and rejecting those other claims.

We now hold that the district court erred in failing to hold an evidentiary hearing on Lesko's claim that the introduction of evidence of his guilty plea to the Nicholls murder at the penalty phase of his trial violated his due process rights. We also hold that the jury's sentencing determination was tainted by improper prosecutorial comments during the penalty phase. Accordingly, we will reverse and remand to the district court for the issuance of a conditional writ of habeas corpus insofar as Lesko's death sentence is concerned. We will affirm the dismissal of the petition insofar as Lesko challenges the jury's guilty verdict, as we find no errors of constitutional significance in the determination of Lesko's guilt.

I. *Background and Procedural History*

In our prior opinion, we summarized the facts underlying Lesko's conviction and death sentence.

> In the early hours of January 3, 1980, John Lesko, Michael Travaglia and Richard Rutherford were cruising the outskirts of the city of Pittsburgh in a stolen sports car. The trio drove past police officer Leonard Miller, sitting in his patrol car parked at the side of the road outside the Stop-and-Go convenience store. Travaglia, the

driver of the car, stated that he "wanted to have some fun with this cop." Travaglia raced past the officer's car beeping his horn, but no pursuit followed. Travaglia turned the car around, again sped past the patrol car, and again failed to elicit a response. The third time Travaglia sped past, Officer Miller turned on his lights and gave chase. Lesko turned to Rutherford in the back seat and cautioned him to "lay down in the back, because it might turn into a shooting gallery."

A moment later, Officer Miller managed to force the sports car off the side of the road. The officer approached the car on foot. Travaglia rolled down his window, extended his .38 caliber hand gun, and shot Officer Miller twice from close range. Officer Miller returned fire, shattering the passenger side of the window. The three companions sped away. The gunshot wounds Officer Miller received proved fatal.

The trio had begun their escapade together a few hours earlier, in the late evening of January 2, 1980, at a hot dog shop in Pittsburgh. At Travaglia's instruction, Lesko and Rutherford went to the alleyway behind the Edison Hotel, and waited. About ten minutes later a sports car appeared. Travaglia sat in the front seat beside the driver and owner of the car, William Nicholls, a stranger. While Lesko and Rutherford were climbing into the back seat, Travaglia pulled out a .22 caliber hand gun and shot Nicholls in the arm.

After Travaglia took the driver's seat, Lesko told Rutherford to handcuff Nicholls behind the back. As Travaglia drove, Lesko repeatedly punched Nicholls in the face and chest, calling him a

queer. Lesko asked Nicholls if he wanted to perform oral sex on him, and taunted him with a knife. Meanwhile, Lesko took Nicholls's belongings, a wallet and an extra set of keys, and told Rutherford to place them in the glove compartment. After Nicholls lost consciousness, Rutherford and Lesko gagged him with a scarf. Travaglia stopped the car near a lake in a wooded area. Lesko propped Nicholls against a nearby tree, his hands cuffed, his mouth gagged, and his feet bound with a belt. Travaglia and Lesko dragged Nicholls down to the lake and rolled him into the water, where he disappeared.

The three men drove to Travaglia's father's house, where Travaglia knew his father kept a gun. Lesko and Rutherford waited in the car while Travaglia entered the house. Travaglia returned with a .38 caliber handgun, which he handed to Lesko. Upon inspection, Lesko discovered that it contained only bird shot. Travaglia, who had begun driving away, turned the car around and returned to his father's house. Travaglia instructed Rutherford to retrieve the box of bullets lying in the trunk of the car parked inside the garage. Lesko stood guard outside. Armed with the gun that had wounded Nicholls, Lesko warned Rutherford that if anything went wrong, Rutherford "had six shots to get out." Rutherford returned with the box of bullets, and the trio drove off. It was these bullets that killed Officer Miller.

After the Miller shooting, Lesko and Travaglia returned to Pittsburgh. At the hot dog shop they met a friend, Keith Montgomery, whom they took to a room in the Edison Hotel and told about the Miller shooting. Travaglia told Montgomery, "I shot

a cop." Lesko added, "I wanted to." Travaglia then gave Montgomery the .38 caliber gun used to shoot Officer Miller. When the Pittsburgh police found Montgomery with that same gun later that evening, Montgomery told the police how he had gotten the gun, and that it had been used to shoot a policeman. Lesko and Travaglia were arrested that night. Before surrendering, Lesko pointed a gun at the police.

After receiving *Miranda* warnings, Lesko and Travaglia each gave statements admitting involvement in the killing of Officer Miller. Lesko told the police that he and Travaglia had instigated the car chase with Officer Miller, "So he'd be chasing us . . . and the car was fast and that—we'd lose him and could go and knock off the Stop-N-Go." In contrast, Travaglia told the police that he was "playing around with [Officer Miller], trying to aggravate him, and I figured he couldn't chase me across county lines; and since he did, I figured if I pointed the gun at him and told him to throw his gun away, he couldn't stop me and I could keep on going. In the process of pulling the gun on him, the hammer slipped and the shot discharged." Lesko and Travaglia also admitted killing William Nicholls.

Lesko, 881 F.2d at 46-47.

After their capture, Lesko and Travaglia faced murder charges in the Court of Common Pleas of Indiana County for the Nicholls homicide and in the Court of Common Pleas of Westmoreland County for the Miller homicide. Lesko was represented at all relevant periods in the Indiana County proceedings by John Armstrong. He was represented throughout the Westmoreland County proceedings by his present counsel.

A. *Indiana County Guilty Plea*

On May 19, 1980, Lesko pled guilty in Indiana County to second degree murder. No written record of a plea agreement exists, but Armstrong and the Indiana County prosecutor stated at the plea hearing that Lesko's guilty plea was made with the understanding that the other charges related to the Nicholls murder would be dismissed and that sentencing on the murder charge would be delayed until "late June." Record of Guilty Plea Proceedings (May 19, 1980) at 32. Although the parties now disagree about the purposes underlying the agreement to defer sentencing, it is undisputed that, as a minimum, Armstrong and the prosecutor intended that sentencing be delayed until the conclusion of Lesko's trial in Westmoreland County.[1] On December 3, 1980, before a sentence had been imposed, Armstrong filed a motion to withdraw Lesko's Indiana County guilty plea, stating that his client wished to stand trial for the charges related to the Nicholls homicide.

B. *Westmoreland County Proceedings*

In January 1981, Lesko and Travaglia were tried jointly in Westmoreland County for the Miller homicide. We have previously summarized the guilt phase of this trial.

> At trial, Lesko and Travaglia's sole defense to the charge of first degree murder was that they each lacked the requisite intent to kill. Lesko's

1. At the later hearing on Lesko's motion to withdraw his guilty plea, the prosecutor testified that "[o]n the day of sentencing Mr. Armstrong approached me and it is my recollection that he asked me if sentencing could be deferred until after the Miller trial in Westmoreland County. I didn't object to that." Record of Proceedings on Motion to Withdraw Guilty Plea (April 28, 1981) at 38.

> counsel argued principally that his client was at most guilty of felony-murder. He argued that in instigating the police chase, defendants planned first to divert the officer from the Stop-and-Go store, and later return to rob the establishment. Therefore, Lesko's lawyer urged, the killing was not pre-meditated, but was the unintended result of a botched robbery attempt. Travaglia's lawyer, meanwhile, emphasized that pulling the trigger had been accidental, a result of the hammer of the gun having slipped as Travaglia aimed at the officer. Neither defendant testified at the guilt phase of the trial. However, statements they made in their taped confessions to the police, which the Commonwealth introduced into evidence, were relied on by defense counsel in support of their respective defense theories.

Lesko, 881 F.2d at 47-48.

Rutherford was the Commonwealth's principal witness at trial. Over defense objections, Rutherford testified about both defendants' roles in the abduction and killing of Nicholls and in the events surrounding the Miller homicide.

On January 30, 1981, the jury found Lesko and Travaglia guilty of murder in the first degree and criminal conspiracy to commit murder. Pursuant to the jury trial procedure specified in Pennsylvania's death penalty statute, 42 Pa. Cons. Stat. Ann. § 9711(a), the trial then proceeded to its penalty phase. The prosecution introduced as a statutory "aggravating circumstance" the fact that defendants had pled guilty in Indiana County to the Nicholls murder.[2] Counsel for both

2. Under Pennsylvania's death penalty statute, conviction of a federal or state offense, "committed either before or at the time of the offense at issue, for which a sentence of life

defendants objected to this testimony on the grounds that the Indiana County convictions were not "final" because sentences had not yet been imposed, and that both men had pled guilty with the understanding that their pleas could not be used against them in the Westmoreland County trial. Trial Transcript ("Tr.") at 1338-39. Lesko's counsel also objected on the basis of his client's still pending motion in Indiana County to withdraw his guilty plea. Tr. at 1404, 1427-29. The trial court denied counsel's motion for an evidentiary hearing on the status of that motion. Tr. at 1429.

Lesko introduced mitigating testimony from his mother, aunt, former girlfriend, and his former girlfriend's mother about his background and character. Tr. at 1627-49. He also provided testimony of a biographical nature. He testified that he never knew his father, and that his mother gave him up to an orphanage when he was seven or eight years old. When he was fourteen, he was returned to his grandmother. He recalled that he had attended a number of schools and was a "straight A" student in the eleventh grade, after which he enlisted in the Marine Corps. He served in the Marines from March 1976 until his administrative discharge in December 1978. He returned to the Pittsburgh area, where he "bounced from job to job." He testified that he first

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imprisonment or death was imposable," is an aggravating circumstance which may support the imposition of the death penalty. 42 Pa. Cons. Stat. Ann. § 9711(d)(10).

Lesko does not dispute that the victim, Leonard Miller, was a "peace office . . . who was killed in the performance of his duties," 42 Pa. Cons. Stat. Ann. § 9711(d)(1), which was the other aggravating circumstance established by the prosecution.

met Michael Travaglia in late November 1979. He was not asked about, and did not discuss, the events surrounding the Nicholls and Miller murders. The prosecutor did not cross-examine Lesko.[3] Tr. at 1651-62.

On February 3, 1981, the jury returned death verdicts against both defendants. As to Lesko, the jury found both aggravating circumstances offered by the prosecution and further found that the aggravating circumstances outweighed the mitigating circumstances.

On direct appeal to the Pennsylvania Supreme Court, Lesko argued that the Commonwealth had breached the Indiana County plea agreement by introducing evidence of the plea as an aggravating circumstance. However, the Pennsylvania Supreme Court did not discuss this issue in its majority opinion and order affirming both defendants' convictions and sentences. *Commonwealth v. Travaglia*, 502 Pa. 474, 467 A.2d 288 (1983), *cert. denied*, 467 U.S. 1256 (1984); *but see* 502 Pa. at 507-08, 467 A.2d at 305 (Nix, J., concurring) ("I . . . join in the Court's mandate today with the caveat that the death penalty will be carried out only after a review of [the challenges to the pleas] by this Court and only if after such review it is determined that the pleas were voluntarily and knowingly entered and the request for withdrawal was properly refused.").

C. *Indiana County Post-Guilty Plea Proceedings*

On April 13, 1981, Armstrong filed an amended motion to withdraw Lesko's Indiana County guilty

3. The trial court denied a request by Travaglia's attorney to cross-examine Lesko on Travaglia's "condition" during their acquaintance. Tr. at 1663.

plea, asserting, *inter alia*, that an essential element of this plea agreement was "the Commonwealth's assurance that he would not be sentenced until after the trials in Westmoreland County. Implicit in this expressed promise by the Commonwealth was the fact that this plea in Indiana County couldn't be used in the trial or sentence in Westmoreland County."

The Indiana County court held a hearing on this motion on April 28, 1981. Lesko did not testify at this hearing. Armstrong also did not testify.[4] However, during the hearing Armstrong argued that "implicit" in counsel's agreement to defer sentencing in Indiana County was the understanding that the plea would not be used against Lesko at the Westmoreland County trial. Record of Proceedings on Motion to Withdraw Guilty Plea (April 28, 1981) at 9. Armstrong also acknowledged that he believed that until sentence was imposed, Lesko's guilty plea did not constitute a "conviction" and thus could not be introduced at the Westmoreland trial. *Id.* at 6-7.[5]

On June 5, 1981, the court denied Lesko's motion to withdraw his guilty plea. It is evident from the court's "Finding of Facts" that its decision was based on its conclusion that the colloquy at the May 19, 1980 plea hearing embodied the entire plea agreement. The court found that "[t]he promise in the instant case was that the

4. Armstrong was ethically barred from testifying, because he was representing Lesko at the time.

5. In its decision in the direct appeal from the Westmoreland conviction, the Pennsylvania Supreme Court ruled that Armstrong's opinion as to the legal effect of the sentencing delay was incorrect. *Travaglia*, 502 Pa. at 495-98, 467 A.2d at 298-300.

defendant's sentence for second degree murder would be delayed; there was no promise on behalf of the Commonwealth, nor request by the defendant, that evidence of the defendant's Indiana County guilty plea would not be used against him at other trials." Opinion and Order of the Court (June 5, 1981) at 7.

On appeal, the Pennsylvania Supreme Court affirmed Lesko's Indiana County conviction, holding that Armstrong was not ineffective for advising Lesko to plead guilty. The court also upheld the trial court's denial of Lesko's motion to withdraw the guilty plea. *Commonwealth v. Lesko*, 502 Pa. 511, 467 A.2d 307 (1983), *cert. denied*, 467 U.S. 1256 (1984). Again, the court's decision was premised on the fact that the plea colloquy did not reveal a promise by the Commonwealth not to use the guilty plea at the Westmoreland County trial. 502 Pa. at 518, 467 A.2d at 310.

D. *PCHA Proceedings*

On April 15, 1985, Lesko filed in Indiana County a petition under Pennsylvania's Post Conviction Hearing Act ("PCHA"), 42 Pa. Cons. Stat. Ann. §§ 9541-9551, alleging that Armstrong was ineffective for advising him that his guilty plea could not be used as an aggravating circumstance. On April 23, 1985, this petition was denied without a hearing on the ground that this issue had been determined in the direct appeal from the Indiana County conviction. *Commonwealth v. Lesko*, No. 35 Crim., 1980 (Indiana Co. Ct. Common Pleas April 23, 1985), *appeal quashed as untimely*, 357 Pa. Super. 636, 513 A.2d 1077 (1986), *allocatur denied*, 513 Pa. 639, 521 A.2d 931 (1987).

Lesko also raised his guilty plea issue in a PCHA petition filed in Westmoreland County. The trial court convened a hearing on this petition on January 28, 1985, but rejected Lesko's proffer of testimony from Armstrong about his plea negotiations with the Indiana County district attorney and about his conversations with Lesko concerning the terms of the plea agreement. Post Conviction Hearing Proceeding Transcript (April 23, 1985) at 3-4, 7-14.[6] The court specifically rejected counsel's attempt to raise the "new issue" of whether there was "an understanding between counsel and the basis of the defendant's plea [sic] that the guilty plea in Indiana County would not be introduced in Westmoreland County." *Id.* at 8. The court considered that the proffered testimony was irrelevant because the Westmoreland County court was not bound by the terms of the Indiana County plea agreement. The court also believed that the guilty plea issue was finally litigated in the direct appeal from the Indiana County conviction.

The Pennsylvania Supreme Court affirmed the denial of Lesko's Westmoreland County PCHA petition. *Commonwealth v. Lesko*, 509 Pa. 67, 501 A.2d 200 (1985), *cert. denied*, 479 U.S. 1101 (1987). The Court determined that Lesko's argument that he "believed" the plea could not be used against him in Westmoreland County was a mere "variant" of the argument that Armstrong had made in his motion to withdraw the guilty plea – namely, that the commitment not to introduce the plea in Westmoreland County was an "implicit" term of the plea agreement. The court agreed with the trial court that this issue had been finally

6. See *Lesko*, 881 F.2d at 68 n.11 (Cowen, J., dissenting) (excerpting transcript of Westmoreland County PCHA hearing).

determined in the direct appeal from Lesko's Indiana County conviction, stating that "[t]he terms of the bargain do not contain the agreement appellant now says he 'believed' was 'implicit' in it." 509 Pa. at 85, 501 A.2d at 208-09.

E. *Habeas Corpus Proceedings*

On June 11, 1986, Lesko filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Pennsylvania. On May 2, 1988, the district court issued the writ, holding that Lesko's right to a fair trial was violated by the introduction of extensive evidence of Lesko's role in the Nicholls murder. *Lesko v. Jeffes*, 689 F. Supp. 508 (W.D. Pa. 1988). On appeal, this court reversed, concluding that evidence relating to the Nicholls murder was relevant to show motive and intent, and that its prejudicial effect did not so outweigh its probative value that its admission denied Lesko a fair trial. *Lesko v. Owens*, 881 F.2d 44 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 759 (1990). We remanded the case to the district court for resolution of the remaining issues raised by Lesko's habeas petition.

On remand, the district court referred the matter to a United States Magistrate, who filed a report and recommendation rejecting the balance of Lesko's habeas claims. On April 12, 1990, the district court approved and adopted the magistrate's report, dismissed the habeas petition, and granted a certificate of probable cause to appeal. This appeal followed.

We have subject matter jurisdiction under 28 U.S.C. § 2254, and appellate jurisdiction under 28 U.S.C. § 1291. This court has already determined

that Lesko has exhausted his state court remedies. *Lesko*, 881 F.2d at 50.[7]

II. *Discussion*

Lesko raises the following issues in this appeal:

1. Whether he is entitled to an evidentiary hearing on his claim that the introduction of his Indiana County guilty plea at the penalty phase of the Westmoreland County trial violated due process, because he had allegedly pled guilty with the understanding that his plea would not be used against him at trial;

2. Whether the exclusion for cause of a veniremember who expressed her personal opposition to the death penalty during voir dire violated *Witherspoon v. Illinois*, 391 U.S. 510 (1968);

3. Whether certain remarks in the prosecutor's closing argument in the penalty phase of the trial constituted an improper and inflammatory "appeal to vengeance";

4. Whether certain remarks in the prosecutor's closing argument in the penalty phase of the trial constituted an impermissible comment on Lesko's failure to testify on the merits of the charges against him;

5. Whether the trial court erred in instructing the jury that it should not consider sympathy in its penalty determination;

6. Whether the death penalty for Lesko, a non-triggerman accomplice to the murder of Officer Miller, is an unconstitutionally disproportionate penalty;

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7. We conclude that in his direct and PCHA proceedings, Lesko exhausted his state court remedies for his present guilty plea claim.

7. Whether the Pennsylvania death penalty statute is unconstitutional as applied because the jury is allowed to return a verdict on non-capital degrees of homicide (in this case, voluntary manslaughter) "even when there is no evidence to sustain such a verdict";

8. Whether the Pennsylvania death penalty statute is unconstitutional because it requires the defendant to establish the existence of mitigating circumstances by a preponderance of the evidence; and

9. Whether the trial court erred in allowing the jury to hear "gruesome details" of Lesko's role in the Nicholls homicide.

A. *Scope of Review*

We recently summarized the scope of our review of a district court decision which denies a habeas petition without a hearing.

> Our scope of review is limited as we sit not to retry state cases *de novo* but rather to examine the proceedings in the state court to determine if there has been a violation of federal constitutional standards. *Milton v. Wainwright*, 407 U.S. 371, 377 (1972). Accordingly, we do not exercise the supervisory power that we might possess on an appeal from a conviction in the district court. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43 (1974). Where, as here, a district court has denied a petition for habeas corpus without holding an evidentiary hearing, our review consists of a two-step analysis. *Smith v. Freeman*, 892 F.2d 331, 338 (3d Cir. 1989) (citing *Toomey v. Clark*, 876 F.2d 1433, 1435 (9th Cir. 1989)). First, we determine whether the petitioner has alleged facts that, if proved, would entitle him to relief. *Smith*, 892 F.2d at 338 (citing *Townsend v. Sain*, 372

U.S. 293, 312 (1963); *Toomey*, 876 F.2d at 1435). If so, we must then decide whether an evidentiary hearing is necessary to establish the truth of those allegations. *Smith*, 892 F.2d at 338 (citing *Townsend*, 372 U.S. at 312-19; *Toomey*, 876 F.2d at 1435).

Zettlemoyer v. Fulcomer, No. 88-5543, slip op. at 11-12 (3d Cir. Jan. 16, 1991). Our review of the district court's decision in this case is plenary, as the dismissal of the habeas petition was based on the state court record, and not on independent factfinding by the district court. *Id.* at 11 n.5.

Applying these standards, we conclude that the district court erred in failing to hold an evidentiary hearing on Lesko's guilty plea claim (Issue 1), and in rejecting his claims based on the prosecutor's closing argument. (Issues 3 and 4). We agree with the district court that there is no merit in Lesko's other claims.

B. *Indiana County Guilty Plea*

Lesko claims that the Commonwealth's use of his Indiana County guilty plea as an aggravating circumstance in the Westmoreland trial was a violation of due process, as he had pled guilty with the understanding that the plea would not be so used. He asserts that his understanding "stemmed directly and reasonably from statements made to him by his Indiana County counsel [John Armstrong] and that these representations played a material part in inducing his guilty plea." Appellant's Brief at 16.

Pursuant to the two-step analysis described above, we shall first determine whether Lesko's allegations, if true, describe a due process violation. We shall then discuss whether the

district court erred in denying this claim without an evidentiary hearing.

1. *Due Process violation*

We begin our first inquiry with a recognition that a counseled and voluntary guilty plea may not be collaterally attacked in a habeas corpus action. *Mabry v. Johnson*, 467 U.S. 504, 508 (1984). As the Supreme Court has recently emphasized:

> A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.

United States v. Broce, 109 S. Ct. 757, 762 (1989).

In this case, Lesko asserts that the introduction of his guilty plea at the penalty phase undermined the plea's voluntary character, as he had pled guilty with the understanding that the plea would not be so used. As he points out, a guilty plea which is induced by promises or threats from counsel that deprive it of its voluntary character is void. A conviction or a sentence which is based on an involuntary plea may be collaterally challenged. *See Santobello v. New York*, 404 U.S. 257, 261-62 (1971); *Machibroda v. United States*, 368 U.S. 487, 493 (1962). The standard for determining whether a guilty plea is "voluntary" for purposes of the U.S. Constitution is a question

of federal law, but the determination of the historical facts surrounding the plea bargain is subject to the deferential "presumption of correctness" of 28 U.S.C. § 2254(d). *Marshall v. Lonberger*, 459 U.S. 422, 431 (1983).

A habeas petitioner faces a heavy burden in challenging the voluntary nature of his guilty plea, for the plea hearing is specifically designed to uncover hidden promises or representations as to the consequences of a guilty plea. As the Supreme Court stated in *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977), "the representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." *Id.* at 73-74.

However, the *Blackledge* Court emphasized that while the record of a plea hearing is an "imposing" barrier to habeas relief, it is not "invariably insurmountable."

> In administering the writ of habeas corpus . . . , the federal courts cannot fairly adopt a *per se* rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment.

Id at 75.

A petitioner challenging the voluntary nature of a facially valid guilty plea on the basis of unfulfilled promises or representations by counsel

must advance specific and credible allegations detailing the nature and circumstances of these statements. *See Machibroda*, 368 U.S. at 495; *Blackledge v. Allison*, 431 U.S. at 74. A collateral challenge to a guilty plea may be summarily dismissed "when [the petitioner's] allegations of an unkept promise are inconsistent with the bulk of his conduct, and when he offers no detailed and specific facts surrounding the agreement." *Davis v. Butler*, 825 F.2d 892, 894 (5th Cir. 1987).

Lesko's specific and corroborated allegations, and the circumstances surrounding his guilty plea, satisfy this threshold standard. Lesko alleges that he "entered the Indiana County guilty plea with the understanding that a plea agreement had been entered into between [Armstrong] and the Indiana County prosecutor under which one of the terms of the plea was that Lesko's Indiana plea would not be used against him in the Westmoreland County prosecution." Appellant's Brief at 16. Although Lesko's Indiana County counsel has not yet been afforded the opportunity to testify concerning the plea negotiations, Armstrong has steadfastly maintained, in the state court proceedings and in an affidavit submitted at our direction,[8] that he believed that he had a

8. To clarify the record before us, we directed the appellant to submit an affidavit from Armstrong detailing his plea negotiations with the Indiana County prosecutor and his conversations with the appellant about the plea terms with Lesko. In the affidavit, Armstrong averred that in a May 19, 1980 meeting with the prosecutor (conducted in the presence of the President Judge of Indiana County, counsel for Travaglia, and others) he secured the prosecutor's agreement that Lesko "would plead guilty to 2nd degree murder with the understanding that the guilty plea in Indiana County would not be used in his Westmoreland County trial." Armstrong Affidavit at ¶¶1-5. Armstrong also stated:

> 6. Initially, one of the participants suggested that the way to implement the agreement was to defer the plea

commitment from the Indiana County prosecutor not to use the guilty plea in the Westmoreland

> in the Indiana County case until after the trial in Westmoreland County.
>
> 7. In response to this suggestion, someone expressed a concern about the time element, especially in view of the requirements of Rule 1100. [Pennsylvania's speedy trial provision]. They said deferring the plea was not desirable.
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> 8. After this suggestion, somebody said the way to implement the agreement of non-use was to have Lesko plead guilty now and defer sentencing until after the Westmoreland County trial had taken place. This was agreed to in chambers.
>
> 9. The entry of the plea was assigned to Judge Earley. To the best of my recollection, Judge Earley was either present at the pretrial conference or advised of the agreement before the plea was entered. Given the extensive discussion regarding the point and purpose of the plea agreement which had transpired in the chambers of Judge Handler, the plea colloquy before Judge Earley was very brief. As the record of the colloquy indicates, I merely indicated that the agreement included the provision designed to implement the non-use agreement by stating that "the sentencing would be passed in late June." At the time, June was the expected trial date for the Westmoreland County case.
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> . . .
>
> 11. I spoke to Lesko about the plea agreement on May 19, 1980. I told him that in exchange for a plea to second degree murder, the District Attorney would nolle pros the three (3) other criminal charges against him pending in Indiana County and that the Indiana County guilty plea would not be introduced at the subsequent Westmoreland County trial.
>
> 12. Lesko understood the plea agreement set forth above and he agreed to plead guilty only on that basis.

We recognize that this affidavit was not part of the record before the district court or state court. We cite it only

proceeding, *and that he communicated this belief to Lesko.*

Based on all of Lesko's and Armstrong's allegations, if true, *it is clear that Lesko believed that the plea agreement included a "non-use" promise by the Indiana County prosecutor.* A plea entered on that basis would not be voluntary, and a sentence based on such a plea may be collaterally attacked.[9] *See Blackledge v. Allison*, 431 U.S. at 75-76 (habeas claim supported by petitioner's "specific factual allegations" that he was induced to plead guilty by his attorney's representation that he had obtained a commitment from the prosecutor and the judge for a more lenient sentence than the one actually imposed); *Davis*, 825 F.2d at 894-95 (habeas claim supported by specific, detailed contention that petitioner had pled guilty because of his counsel's assurance that he would be pardoned three years after sentencing); *United States v. Marzgliano*, 588 F.2d 395, 397-99 (3d Cir. 1978) (§ 2255 claim supported by specific and corroborated allegations that defense counsel had misled defendant about sentencing provisions of plea agreement); *McAleney v. United States*, 539 F.2d 282 (1st Cir. 1976) (defendant in § 2255 action permitted to withdraw

for the purpose of clarifying Armstrong's already stated allegations regarding the circumstances surrounding the plea agreement.

9. However, we agree with Judge Cowen's observation in his prior dissent that under *Brady v. United States*, 397 U.S. 742 (1970), if Lesko relied on his attorney's faulty analysis of Pennsylvania law regarding whether a deferred sentence would count as a conviction — rather than his attorney's alleged representation about a non-use agreement with the prosecutor — his "reliance would be insufficient to render a guilty plea invalid on collateral attack." *Lesko*, 881 F.2d at 71 (Cowen, J., dissenting).

plea because of counsel's misrepresentation that prosecutor would recommend light sentence); *United States v. Valenciano*, 495 F.2d 585 (3d Cir. 1974) (§ 2255 claim supported by allegations that defense counsel had failed to advise client of special parole term, and had incorrectly informed him that two sentences would be concurrent, rather than consecutive); *Moorhead v. United States*, 456 F.2d 992, 995 (3d Cir. 1972) (defendant permitted to collaterally attack guilty plea because of his attorney's misrepresentation that the prosecutor would recommend probation or suspended sentence).

We therefore turn to our second inquiry: whether the district court erred in denying Lesko an evidentiary hearing on his guilty plea claim.

2. *Necessity for Evidentiary Hearing*

In *Valenciano*, a § 2255 case, we stated that "[w]here the voluntariness of the plea is attacked with an assertion that one's counsel or the prosecutor, or both, made an out-of-court arrangement or 'proposition' as to the outcome of a sentence which differs from that pronounced by the court, an evidentiary hearing will ordinarily be necessary on a § 2255 motion attacking the voluntariness of the plea." 495 F.2d at 587. When a § 2254 petitioner raises material disputed facts which, if true, would entitle the petitioner to relief, the district court also must hold an evidentiary hearing, "if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding." *Townsend v. Sain*, 372 U.S. 293, 312 (1963). The Supreme Court has held that evidentiary hearings are required under the following circumstances:

> (1) the merits of the factual dispute were not resolved at the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313; *see also Smith v. Freeman*, 892 F.2d at 338; *Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir.), *cert. denied*, 484 U.S. 946 (1987); *Sullivan v. Cuyler*, 723 F.2d 1077, 1084 (3d Cir. 1983). Congress has for the most part codified the *Townsend* criteria in 28 U.S.C. § 2254(d), which provides that a habeas court shall accord a presumption of correctness to "a determination after a hearing on the merits of a factual issue" made in the course of the petitioner's state court proceedings. This presumption may be rebutted by a showing that the state court determination was deficient for one of the reasons specified in *Townsend*.

The district court concluded that in the plea hearing itself, and in the hearing on Lesko's motion to withdraw his guilty plea, the state courts provided a "full record" on the facts underlying Lesko's present guilty plea claim, and thus an evidentiary hearing in federal court was unnecessary. Magistrate's Opinion at 9. We disagree.

Indisputably, there was no mention in the plea colloquy of the prosecutor's alleged commitment

not to use Lesko's guilty plea against him in Westmoreland County. However, the plea colloquy does not negate the possibility that Lesko understood the prosecutor's alleged "non-use" agreement to be subsumed in counsels' explicit agreement to delay sentencing on the Indiana County murder charge. The later hearing on Lesko's motion to withdraw his guilty plea also did not constitute the requisite "full and fair" hearing on Lesko's voluntariness claim. It is clear from the transcript of this hearing, and from the characterization of the record by the state trial and appellate courts, that judicial review was restricted to the issue of the *existence* of an agreement not to use the Indiana plea at the Westmoreland trial. The state courts rested their determination that there was no such agreement mentioned in the plea colloquy itself or in the later testimony from the Indiana County prosecutor at the hearing on Lesko's motion to withdraw his plea. The courts never fully addressed, and did not finally resolve, the distinct issue of the *voluntary* nature of Lesko's plea.

On habeas review, the presumption of correctness of state court factfinding is inapplicable "if the merits of the factual dispute are not resolved at the state hearing. In such circumstances, the federal court must grant an evidentiary hearing to a habeas applicant." *Sullivan*, 723 F.2d at 1084; *see also* 28 U.S.C. § 2254(d)(1). Lesko raises a genuine factual issue about the voluntariness of his plea by his specific and corroborated allegation that Armstrong represented to him that he had secured a "non-use" agreement from the prosecutor. This critical issue has not yet been finally resolved in an evidentiary hearing in either his state or federal

proceedings. Accordingly, we will remand this case to the district court to conduct such a hearing.[10]

C. *Prosecutor's Closing Argument*

Lesko did not testify during the guilt phase of the trial. At the penalty phase, he and his witnesses presented mitigating testimony concerning his deprived childhood and family background. Lesko did not testify as to the merits of the charges against him, and he was not cross-examined by the prosecution.

In their closing arguments in the penalty phase, defense counsel contended that the death penalty was cruel and ineffective as a deterrent to crime. Tr. at 1665-84. Lesko's counsel urged the jury to consider as mitigating circumstances his client's relatively passive role in the Miller homicide, his young age,[11] and his troubled and impoverished upbringing. Tr. at 1668-73.

In his closing argument, the prosecutor made the following comments about Lesko's mitigating evidence concerning his background:[12]

> Good character and record. All of the character witnesses limited their testimony to a certain period of time. . . We heard about John Lesko up to a certain point.

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10. Of course, such a hearing will not be necessary if, on remand, the Commonwealth represents to the district court that it will not introduce evidence of Lesko's Indiana County guilty plea at the resentencing proceeding in this case.

11. Lesko was twenty one years old at the time of the Miller homicide. Tr. at 1670.

12. Defense counsel objected to both of the above quoted comments. Tr. at 1718-21, 1723.

> And I want you to consider that. John Lesko took the witness stand, and you've got to consider his arrogance. He told you how rough it was, how he lived in hell, and he didn't even have the common decency to say I'm sorry for what I did. I don't want you to put me to death, but I'm not even going to say that I'm sorry.

Tr. at 1697.

At the conclusion of his remarks, the prosecutor urged the jurors to abide by their oaths to "follow the law" and not to act like "social activists." He then stated that he could not stop the jury from "show[ing] sympathy," adding:

> So I'll say this: Show them sympathy. If you feel that way, be sympathetic. Exhibit the same sympathy that was exhibited by these men on January 3rd, 1980. No more. No more.
>
> I want you to remember this: We have a death penalty for a reason. Right now, the score is John Lesko and Michael Travaglia two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's your duty.

Tr. at 1701-02.

Lesko challenges both of the above statements. He argues that the first remark was an impermissible comment on his assertion of his fifth amendment privilege against self-incrimination. He contends that the second comment constituted an "appeal to vengeance" that was "so calculated to inflame the jury and deflect it from its proper performance of its duty that it was in violation of due process of law." Appellant's Brief at 30.

The sentencing phase of a death penalty trial is one of the most critical proceedings in our criminal justice system. It is *clearly* the most critical legal proceeding from the standpoint of the defendant whose life is at stake. Because of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices. Justice Sutherland's oft-quoted statement about the unique role of a United States Attorney in criminal prosecutions generally applies with particular force to the prosecuting attorney in the penalty phase of a capital case.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 76, 88 (1935).

We are particularly troubled by the prosecutor's comment about Lesko's failure to express remorse, but we believe that both remarks were improper. Considered cumulatively, the errors in the prosecutor's penalty phase argument were not harmless under *Chapman v. California*, 386 U.S. 18 (1967).

1. *Comment on Failure to Express Remorse*

Lesko asserts that the prosecutor's remarks about his failure to express remorse constituted a comment on his assertion of his fifth amendment privilege against self-incrimination, in violation of the rule of *Griffin v. California*, 380 U.S. 609 (1965), forbidding such comment. The appellees counter that the prosecutor's statement should not be considered an improper comment on Lesko's failure to testify, because Lesko did in fact testify at the penalty phase. They also characterize the challenged remark as an appropriate exhortation to the sentencing jury to consider Lesko's demeanor.

We shall first examine the applicability of the *Griffin* rule to the circumstances before us, and then discuss whether the rule was violated in this case.

a. *Applicability of Griffin*

In *Griffin*, the Court held that the fifth amendment's self-incrimination clause bars a prosecutor from commenting to the jury on a defendant's failure to testify at trial. The Court reasoned that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614 (quoting *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964)).

Without attempting to define the outer limits of the fifth amendment privilege in death penalty sentencing proceedings, we conclude that the *Griffin* rule is applicable in both the guilt and

penalty phases of a death penalty trial. We further conclude that a capital defendant does not completely waive his *Griffin* rights by testifying at the penalty phase solely on mitigating factors that are wholly collateral to the merits of the charges against him.

Our first conclusion is mandated by the Supreme Court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981). In that death penalty case, a psychiatrist had testified for the state during the penalty phase, despite the fact that the defendant had not been advised of his *Miranda* rights before the psychiatric examination. The Court ruled that this testimony violated the defendant's self-incrimination privilege, stating that "'the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.'" *Id.* at 462 (quoting *In re Gault*, 387 U.S. 1, 49 (1967)). The Court concluded that it could

> discern no basis to distinguish between the guilt and penalty phases of the respondent's murder trial so far as the protection of the Fifth Amendment is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental guarantees. Any effort by the state to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.

Id. at 462-63.

Considering the Court's emphatic language in *Smith v. Estelle*, and its steadfast adherence to the

essential principles of *Griffin*,[13] we believe that *Griffin*'s protections apply equally to the guilt and penalty phases of a death penalty trial.

Lesko provided testimony of a biographical nature at the penalty phase of his trial. Clearly, then, he could not claim a fifth amendment privilege against cross-examination or prosecutorial comment on matters reasonably related to his credibility or the subject matter of his testimony. *See Harrison v. United States*, 392 U.S. 219, 222 (1968) ("A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives . . ."); *cf. McGautha v. California*, 402 U.S. 183, 217 (1971) ("[T]he policies of the privilege against compelled self-incrimination are not offended when a defendant in a [non-bifurcated] capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt.") Furthermore, it is permissible for the prosecutor or the court to advise the jury that it may draw an adverse inference from the defendant's silence when the defendant has testified as to some facts concerning the crime charged, but has refused to testify as to other facts within his knowledge. *See United States v. Weber*, 437 F.2d 327, 334 (3d Cir. 1970) (citing *Caminetti*

13. See, *e.g.*, *United States v. Hasting*, 461 U.S. 499, 507 (1983) (*Griffin* "interpreted the Fifth Amendment guarantee against self-incrimination to mean that comment on the failure to testify was an unconstitutional burden on the basic right"); *Jenkins v. Anderson*, 447 U.S. 231, 235 (1980) (*Griffin* "prevents the prosecution from commenting on the silence of a defendant who asserts the right" not to testify); *Mackey v. United States*, 401 U.S. 667 (1971) ("*Griffin* . . . construed the Fifth Amendment to forbid comment on defendants' failure to testify, thereby removing a burden from the exercise of the privilege against compulsory self-incrimination and further implementing its purpose").

v. United States, 242 U.S. 470, 494 (1917)), *cert. denied*, 402 U.S. 932 (1971).

However, we do not believe that a defendant's penalty phase testimony about mitigating factors that are wholly collateral to the charges against him operates as a complete waiver of the defendant's self-incrimination privilege or his rights under *Griffin*. Under these circumstances, we believe that the *Griffin* rule forbids prosecutorial comment about the defendant's failure to testify concerning the merits of the charges against him.

This application of *Griffin* is consistent with the principle — which was well-established at the time of Lesko's trial, *see Teague v. Lane*, 489 U.S. 288 (1989) — that a criminal defendant does not completely waive the fifth amendment privilege by testifying solely on collateral or preliminary matters. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (defendant's testimony at pretrial suppression hearing may not be admitted against him at trial); *United States v. Inmon*, 568 F.2d 326, 332 (3d Cir. 1977) (defendant's testimony on hearing on double jeopardy claim may not be used against defendant at trial); *United States v. Branker*, 418 F.2d 378, 380 (2d Cir. 1969) (defendant's testimony at appointment of counsel hearing may not be admitted against him at trial); *cf. United States v. Yurasovich*, 580 F.2d 1212, 1218 (3d Cir. 1978) (guilty plea constitutes "waiver of Fifth Amendment rights solely with respect to the crime to which the guilty plea pertains."). As in *Griffin*, the courts in these cases were concerned with maintaining the vitality of the self-incrimination privilege by not imposing a prohibitive cost on its exercise. This concern is especially pronounced in the present context.

Without the protection of *Griffin*, a capital defendant in the penalty phase of his trial could avoid prosecutorial comment about his failure to address the charges against him only at the price of not providing what may be his "life or death" testimony about collateral mitigating circumstances. This is too high a price to require the accused to pay for the maintenance of his fifth amendment privilege.

Although counsel has not cited, and our research has not disclosed, any case that precisely addresses this issue, we believe that *Calloway v. Wainwright*, 409 F.2d 59 (5th Cir. 1969), *cert. denied*, 395 U.S. 909 (1969), is instructive. In that death penalty case, the defendant testified at trial for the limited purpose of challenging the voluntariness of his confession. During closing argument, the prosecutor repeatedly commented on the defendant's failure to testify about the substance of the charges against him. The court rejected the state's contention that the defendant's limited testimony constituted a complete waiver of his fifth amendment privilege against self-incrimination, and held that the prosecutor's comments violated *Griffin*. The court reasoned that

> the determination by the jury of the weight to be given to a confession is a collateral issue and such determination does not directly relate to the issue of guilt. *Cf. Simmons v. United States*, 390 U.S. 377 (1968). Under these circumstances the prosecutor cannot draw unfavorable inferences from the failure of the accused to testify on the merits of the accusation.

409 F.2d at 65.

In contrast to Calloway's testimony about the voluntariness of his confession,[14] Lesko's penalty phase testimony about this childhood, family background, and schooling did not bear even a tangential relationship to the substance of the charges against him.[15] We do not believe that Lesko's limited testimony constituted a waiver of his right under *Griffin* to be free from prosecutorial comment about his failure to testify about the merits of the prosecution's case.

b. *Violation of Griffin*

Having concluded that Lesko retained the protection of the *Griffin* rule, we must now determine whether the challenged comments violated that rule, or whether, as the appellees assert, the prosecutor's statement was simply an appropriate reference to Lesko's demeanor at trial.

Our well-established test for determining whether a prosecutor's remark violates *Griffin* is "whether

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14. The *Calloway* court noted that "[b]efore taking the stand appellant's attorney announced to the Court that appellant was testifying only as to the manner in which the confession was obtained. During the course of his testimony appellant stated at least three times 'I didn't do it.'" 409 F.2d at 64.

15. *Compare Tucker v. Francis*, 723 F.2d 1504 (11th Cir.), *vacated for reh'g en banc*, 728 F.2d 1358 (1984), *reinstated in relevant part*, 762 F.2d 1496 (1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986). The *Tucker* court held that because defendant had testified on the merits of charges against him during the penalty phase, prosecutorial comment on defendant's failure to testify during guilt phase was permissible. However, the court stated that under *Calloway*, "[h]ad the appellant limited his presentence testimony to *biographical mitigating factors* this case might be susceptible of a 'collateral matter' or partial waiver limitation." 723 F.2d at 1514 (emphasis added).

the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *Bontempo v. Fenton*, 692 F.2d 954, 959 (3d Cir. 1982) (quoting *United States v. Cheney*, 446 F.2d 571, 576 (3d Cir. 1971)), *cert. denied*, 460 U.S. 1055 (1983). In making this determination, we must examine the challenged prosecutorial remark in its trial context. *United States v. Robinson*, 485 U.S. 25, 31-33 (1988); *Lockett v. Ohio*, 438 U.S. 586, 595 (1978).

Under this test, the prosecutor's remarks constituted an impermissible comment on Lesko's failure to testify on the merits. The prosecutor asked the jury to consider Lesko's "arrogance" in taking the "witness stand" to present mitigating evidence about his background, without even having the "common decency to say I'm sorry for what I did." The prosecutor then parodied the gist of Lesko's testimony: "I don't want you to put me to death, but I'm not even going to say that I'm sorry." Tr. at 1697. To the jury, the natural and necessary interpretation of these comments would be that Lesko had a moral or legal obligation to address the charges against him – indeed, to apologize for his crimes – during his penalty phase testimony, and that the jury could and should punish him for his failure to do so.

We need not reach the broad question of whether, and to what extent, a defendant's demeanor is relevant to the sentencing determination in a death penalty case, because we do not consider that the prosecutor's comments in this case were a simple reference to demeanor. Fairly construed, the prosecutor's remark was a condemnation of Lesko's failure to testify about his

role in the events surrounding the Miller homicide. Clearly, such testimony would have been self-incriminating. (It also would have almost certainly contradicted Lesko's steadfast position throughout the trial that he did not intend to kill Officer Miller, but was simply a passive observer to the shooting. *See People v. Coleman*, 71 Cal.2d. 1159, 80 Cal.Rptr. 920, 459 P.2d 248, 254 (1969); *Owen v. Texas*, 656 S.W.2d 458, 459-60 (Tex.Cr.App. 1983) (en banc)).[16] Thus, we conclude

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16. While not directly analogous, *Coleman* and *Owen* are instructive, as both of those death penalty cases involve defendants whose trial testimony at the guilt phase was followed by prosecutorial comments at the penalty phase condemning the defendants' lack of remorse.

The defendant in *Coleman* had testified at the guilt phase of his trial to deny that he planned or participated in the events leading up to the homicide. In his closing argument during the penalty phase, the prosecutor criticized Coleman's failure to admit guilt and show remorse. The California Supreme Court, per Chief Justice Traynor, held that the prosecutor's comments were improper. The court stated that although the sentencing jury "may properly consider the defendant's remorse or lack thereof in fixing the penalty," not "every inference bearing on the question of remorse may be urged upon the jury by counsel."

> A defendant would be placed in an intolerable dilemma if his failure to confess following conviction could be urged at the trial on the issue of penalty as evidence of lack of remorse. To silence such argument, a defendant who had denied his guilt at the trial on the issue of guilt would have to admit or commit perjury at the trial on the issue of penalty, and he could do neither without in effect forfeiting his right to urge the trial court on motion for a new trial to reweigh the evidence on the issue of guilt. We conclude that any argument that failure to confess should be deemed evidence of lack of remorse is not permissible.

459 P.2d at 254.

that the prosecutor's criticism of Lesko's failure to express remorse penalized the assertion of his fifth amendment privilege against self-incrimination, in violation of the rule in *Griffin v. California*.[17]

2. *"Appeal to Vengeance"*

We believe that the conclusion of the prosecutor's closing argument was improper in two important respects. First, the prosecutor's comments were "directed to passion and prejudice rather than to an understanding of the facts and of the law." *United States ex rel. Perry v. Mulligan*, 544 F.2d 674, 680 (3d Cir. 1976), *cert. denied*, 430 U.S. 972 (1977). Although he could properly counsel the jury to avoid emotional responses that were not rooted in the trial evidence, *see California v. Brown*, 479 U.S. 538, 542-43 (1987), and could

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In *Owen*, the defendant, who testified in the guilt phase of his homicide trial in support of his theory of self-defense, was found guilty of voluntary manslaughter. He did not testify during the subsequent penalty phase of the trial. In his closing argument at the penalty phase, the prosecutor twice condemned the defendant's failure to say he was "sorry" for his crime.

On appeal, the court rejected the state's contention that because Owen had testified at the guilt phase, the prosecutor could properly comment on the appellant's failure to express remorse. The court observed that "[a]cceptance of the state's argument would place an accused in the paradoxical position of saying I am sorry for a crime of which I am not guilty." 656 F.2d at 459-60.

17. We do not believe that the challenged remarks constitute a "fair response" to a claim made by Lesko or his counsel, *see United States v. Robinson*, 485 U.S. 25, 31-33 (1988), as we see nothing in Lesko's testimony or in his attorney's closing argument that invited prosecutorial comment on Lesko's failure to address the charges against him.

argue in favor of the purposes of the death penalty, including the objectives of retribution and deterrence, *see Gregg v. Georgia*, 428 U.S. 153, 183-87 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.), the prosecutor exceeded the bounds of permissible advocacy by imploring the jury to make its death penalty determination in the cruel and malevolent manner shown by the defendants when they tortured and drowned William Nicholls and shot Leonard Miller.

In *Drake v. Kemp*, 762 F.2d 1449, 1458 (11th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986), the court considered the propriety of a prosecutor's quotations in his closing argument from century-old Georgia Supreme Court opinions that condemned "that sickly sentimentality that springs into action whenever a criminal is at last about to suffer for a crime . . ." and "the false humanity that starts and shudders when the axe of justice is ready to strike." The court held that these remarks were improper, explaining that

> [t]he ultimate power of the jury to impose life [imprisonment], no matter how egregious the crime or dangerous the defendant, is a tribute to the system's recognition of mercy as an acceptable sentencing rationale . . . . Thus, the suggestion that mercy is inappropriate was not only a misrepresentation of the law, but it withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life.

Id. at 1460. Although the prosecutor's remarks in *Drake* were stronger and lengthier than the ones at issue here, the comments in this case were similarly calculated to incite an unreasonable and retaliatory sentencing decision, rather than a

decision based on a reasoned moral response to the evidence.

Second, the prosecutor's suggestion that the jury had a "duty" to even the "score," which stood at "John Lesko and Michael Travaglia two, Society nothing," invited the jury to impose the death sentence not only for the Miller murder, but also for the Nicholls murder – a crime to which Lesko had already pled guilty, and for which he would be separately sentenced. As the appellees point out, the sentencing jury could properly consider a prior murder conviction as an "aggravating circumstance." 42 Pa. Cons. Stat. Ann. § 9711(d)(10). However, the jury had no authority to impose the death penalty for the Nicholls murder itself. The prosecutor's suggestion that the jury had a "duty" to do so was clearly improper. *See Rogers v. Lynaugh*, 848 F.2d 606, 611 (5th Cir. 1988) (prosecutor's argument that jury's sentence should include punishment for prior felony convictions constituted an "exhortation to assess multiple punishments for the same offense," in violation of the double jeopardy clause of the fifth amendment).

On habeas review of prosecutorial comments in state trials, we cannot rest with a determination that the remarks were undesirable or inappropriate, because "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the administration of justice.'" *Donnelly v. DeChristoforo*, 416 U.S. at 642 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)). Instead, "the relevant question is whether the prosecutors' comments 'so infected the trial with

unfairness as to make the conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly*, 416 U.S. at 643). We are not convinced that, considered in isolation, the prosecutor's "appeal to vengeance" would satisfy the stringent standards of *Donnelly* and *Darden*. However, for the reasons stated in the next section, we believe that these comments, considered together with the prosecutor's *Griffin* error, necessitate habeas relief as to the death penalty.

3. *Harmless Error*

In *Chapman*, the Supreme Court held that federal constitutional errors in criminal trials that are shown to be harmless beyond a reasonable doubt do not require reversal of the conviction. In *Chapman*, the inquiry into harmlessness was formulated as "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 23 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). In reviewing improper prosecutorial comments occurring in the penalty phase of a bifurcated capital case, we will not consider the comments to be harmless unless the state has demonstrated, beyond a reasonable doubt, that the remarks did not change the jury's exercise of discretion in choosing between life imprisonment or death. We shall also consider the Supreme Court's statement that "although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

Although the death penalty is not an unconstitutionally disproportionate penalty in Lesko's case, *see* Section II.F., *infra*, the evidence before the sentencing jury was not so compelling or so overwhelming that we can declare with confidence that the prosecutor's "appeal to vengeance" and his improper reference to Lesko's failure to express remorse did not influence the jury's sentencing decision. Counterbalanced against the prosecution's aggravating evidence was significant mitigating evidence showing, *inter alia*, that Lesko's participation in the homicide was relatively minor, that he was a young man at the time of the offense, and that he had a deprived and troubled childhood. *See* 42 Pa. Cons. Stat. Ann. §§ 9711(e)(4), (e)(7), (e)(8). The jury apparently credited at least some of Lesko's mitigating evidence, as it found that the aggravating circumstances "outweigh[ed]" the mitigating circumstances. Tr. at 1731-32.

The trial judge instructed the jury that it should base its penalty decision on the evidence, and not upon considerations of sympathy for either the defendants *or* the victim. Tr. at 1706. *See* Section II.E., *infra*. The judge also instructed the jury that "it is entirely up to a defendant whether to testify, and you must not draw any adverse inference from the fact that a defendant does not testify." Tr. at 1706. However, these instructions were neither immediate, *see United States v. Dansker*, 537 F.2d 40, 63 (3d Cir. 1976) ("immediate cautionary instructions" could "insure[] that no juror would misconstrue the prosecutor's statement as an adverse comment on [defendant's] failure to testify"), *cert. denied sub nom. Valentine v. United States*, 429 U.S. 1038 (1977), nor did they specifically address the prosecutor's errors. *See*

United States v. Adamo, 534 F.2d 31, 40 (3d Cir.) (district court instruction sufficient to cure possible ambiguity in prosecutor's remark that allegedly violated *Griffin*), *cert. denied sub nom. Kearney v. United States*, 429 U.S. 841 (1976). Thus, these instructions did not render the prosecutor's remarks harmless.

In sum, given Lesko's mitigating evidence, and considering the prosecutor's *Griffin* violation and "appeal to vengeance" in context, we conclude that the errors in the prosecutor's closing argument were not harmless.

D. *Exclusion of veniremember*

Lesko argues that the trial court's exclusion for cause of a veniremember who had expressed her personal opposition to the death penalty violated *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968), which held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voice general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

During her examination by the prosecutor, veniremember Esther Kroh, a seventy four year old woman, denied that she had "any conscientious scruples against imposing the death penalty," and stated that she could vote "either way" if the jury was called upon to determine whether to sentence the defendants to life imprisonment or to death. Jury Selection Transcript at 255-56. At the conclusion of his examination, the prosecutor stated that Ms. Kroh was "acceptable to the prosecution." *Id.* at 258.

Ms. Kroh's views on capital punishment were further probed during her examination by Travaglia's attorney.

Q: Well, let me ask this ma'am: as regards the death penalty, should the jury return a verdict against either one or both of these defendants for first degree murder, are your feelings about the death penalty such that if you had to make a decision as to whether to impose the death penalty or impose a sentence of life, simply because the victim in this case was a police officer, would you then irrespective of the other evidence that you heard vote automatically for the death penalty?

A: No sir, I'm opposed to the death penalty.

COUNSEL: This witness is acceptable to the defendant.

THE COURT: Are you saying under all circumstances, that irrespective of what evidence was given to you, because you are opposed to the death penalty, you could not participate in imposing the death penalty upon somebody, irrespective of what evidence was given to you?

A: Well, I am opposed, yes.

THE COURT: You're opposed to the death penalty?

A: Yes sir.

Id. at 260-61.

After counsel for both defendants stated that Ms. Kroh was acceptable as a juror, the prosecution moved that she be excused for cause, stating that

her responses to defense counsel were "directly opposed" to the statements she had made to him. *Id.* at 261-62. The court granted this motion, ruling that "under the situation as observed and determined by this Court, this juror is not qualified to serve." *Id.* at 262.

The Supreme Court has never retreated from its essential position in *Witherspoon* that "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." 391 U.S. at 519. *See Lockhart v. McCree*, 476 U.S. 162, 176 (1986) ("[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."). Despite certain language in *Witherspoon* that might have implied a broader standard,[18] however, the Court has held that a trial court may properly excuse a juror for cause if that individual's opposition to capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 421 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

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18. The *Witherspoon* Court stated that "[u]nless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that is his position." 391 U.S. at [515] n.9. The Court also noted that its holding did not apply when "the only veniremen who were in fact excluded were those who made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial in the case before them. . ." *Id.* at 522 n.21.

The *Witt* Court believed that this standard was more practical than any bright-line test of juror bias, because "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Id.* at 424-25. The Court also held that a state trial court's determination that a particular veniremember is impermissibly biased against the death penalty is essentially a factual finding that is entitled to a "presumption of correctness" under 28 U.S.C. § 2254(d). *Id.* at 426-29.

Turning to the present case, we conclude that the trial judge did not err in excluding Ms. Kroh for cause. Her statements on voir dire establish a likelihood that her opposition to capital punishment would have substantially impaired her ability to comply with the trial court's sentencing instructions. Although Ms. Kroh initially stated to the prosecutor that she would be willing to vote for the death penalty in a proper case, she later provided an ambiguous response to defense counsel's query about whether "irrespective of the evidence" she would "vote automatically for the death penalty" for a defendant convicted of murdering a police officer. Ms. Kroh then responded affirmatively to the court's inquiry about whether "under all circumstances" and "irrespective of [the] evidence" her opposition to capital punishment would prevent her from participating in a decision to impose the death penalty.

Construed reasonably, and with the requisite deference to the trial court's assessment of Ms.

Kroh's demeanor, *see Witt*, 469 U.S. at 434, this last response was not simply an expression of an abstract conscientious or philosophical objection to capital punishment. *See Maxwell v. Bishop*, 398 U.S. 262, 264-65 (1970). Ms. Kroh's response was an affirmation that her personal opposition to the death penalty would prevent her from considering the full range of lawful penalties. In this respect, her comments are indistinguishable from those that the *Witt* Court found sufficient to justify exclusion from the jury. *Id.* at 415-16. Accordingly, we hold that the trial court did not commit reversible error in excluding Ms. Kroh for cause.

E. *Anti-sympathy Instruction*

Lesko contends that the trial court erred in giving the following instruction to the jury at the conclusion of the penalty phase of his trial.

> Now, the verdict is for you, members of the jury. Remember and consider all of the evidence, giving it the weight to which you deem it is entitled. Your decision should not be based on sympathy, because sympathy could improperly sway you into one decision – into a decision imposing the death sentence, or could improperly sway you against the decision of imposing the death sentence. There is sympathy on both sides of that issue. Sympathy is not an aggravating circumstance; it is not a mitigating circumstance.

Tr. at 1706.

Lesko asserts that this "anti-sympathy" instruction impermissibly limited the jury's consideration of the mitigation evidence presented at the penalty trial concerning his childhood and family background, in violation of the holdings of

Lockett v. Ohio, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), that a sentencing jury in a death penalty case must not be precluded from considering as a mitigating factor any relevant aspect of the defendant's background or record.

Although Lesko's argument may be based on a plausible reading of *Lockett* and *Eddings*, we cannot consider those opinions on a clean slate. Lesko's challenge is foreclosed by two more recent Supreme Court decisions that have upheld substantially similar anti-sympathy jury instructions.

In *California v. Brown*, 479 U.S. 538 (1987), the Court rejected a challenge to an instruction that cautioned the jury not to be swayed "by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[19] The Court concluded that even if a juror focused on the judge's instruction to avoid basing the sentencing decision on "*mere* sympathy," he or she "would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced in the penalty phase." *Id.* at 542.

In *Saffle v. Parks*, 110 S. Ct. 1257 (1990), the Court considered a challenge to an instruction directing the sentencing jury in a capital case to "avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence." *Id.* at 1259. Like Lesko, Parks argued that the anti-sympathy instruction violated

19. As we observed in our last opinion in this case, the jury instruction in *Brown* was "very similar to the one given the Lesko jury." *Lesko*, 881 F.2d at 49 n.6.

the eighth amendment. However, the Court held that the principle Parks urged could not be applied on federal habeas review, because it was a "new rule" within the meaning of *Teague v. Lane* that was not dictated by Supreme Court caselaw at the time his conviction became final in 1983.[20] The Court determined that the rationale of *Lockett* and *Eddings* did not preclude the trial court from delivering its anti-sympathy instruction, stating that nothing in those decisions

> prevents the State from attempting to ensure reliability and nonarbitrariness by requiring that the jury consider and give effect to the defendant's mitigating evidence in the form of a "reasoned *moral* response," rather than an emotional one. The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice.

Parks, 110 S. Ct. at 1262 (citations omitted).

Lesko attempts to distinguish *Brown* and *Parks* on the basis of differences in the language of the challenged instruction in his case, but these are differences of form, not substance. The essential message of the present instruction is similar to that of the anti-sympathy instructions reviewed by the Supreme Court: that the sentencing determination should not be based solely on the

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20. Lesko is similarly situated, as his conviction became final for purposes of *Teague v. Lane* on June 18, 1984, when the Supreme Court denied his certiorari petition in his direct appeal of his Westmoreland County conviction. 467 U.S. 1256. This date is after the issuance of the Supreme Court's decisions in *Lockett* and *Eddings*, and before its decision in *Brown*.

juror's emotional sensitivities, but on their evaluation of the actual evidence concerning the crime and the defendant.[21] Thus, the anti-sympathy instruction in this case passes constitutional muster.

F. *Disproportionality*

Lesko's defense at trial is that he willingly joined Travaglia and Rutherford on their mission to rob the convenience store, but that he was merely a passive and unwitting observer to Travaglia's shooting of Officer Miller. He was nevertheless convicted of first degree murder and criminal conspiracy to commit murder. Lesko argues that under *Enmund v. Florida*, 458 U.S. 782 (1982), the death sentence is an unconstitutionally disproportionate penalty for his participation in the Miller homicide.

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21. Lesko points out that Justice O'Connor, whose vote was necessary to establish the five justice majority in *Brown* stated in her concurring opinion that, on remand, the state court should "determine whether the jury instructions, taken as a whole, and considered in combination with the prosecutor's closing argument, adequately informed the jury of its responsibility to consider all of the mitigating evidence introduced by the respondent." 479 U.S. at 546 (O'Connor, J., concurring).

Assuming *arguendo* that Justice O'Connor's concurrence limited the *Brown* holding, we believe that the jury instructions, taken as a whole, meet the concern expressed in her concurrence. The trial judge instructed the jury to consider all relevant statutory mitigating circumstances, including the catch-all factor of 42 Pa. Cons. Stat. Ann. § 9711(e)(8) — "any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense." Tr. at 1704. The judge later instructed the jury to "[r]emember and consider all of the evidence, giving it the weight you deem it is entitled." Tr. at 1706.

In *Enmund*, the petitioner was sentenced to death following his conviction for a murder committed during the course of a botched robbery. He was not present at the scene of the crime, nor was it shown that he intended to kill the victims. However, the record supported an "inference" that he was in a car at the time of the killings, waiting to help the robbers escape. *Id.* at 788. Under Florida law, this was sufficient to make him "a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed." *Id.*

The Supreme Court determined that the eighth amendment barred imposition of a death sentence in these circumstances, as the Florida procedure did not ensure that the penalty was reasonably related to the petitioner's "personal responsibility and moral guilt." *Id.* at 801. The Court reasoned that the focus of the sentencing determination "must be on [Enmund's] culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' which means that we must focus on 'relevant facets of the character and record of the individual offender.'" *Id.* at 798 (citations omitted).

The Court applied its *Enmund* holding in *Tison v. Arizona*, 481 U.S. 137 (1987), which involved a challenge to death sentences imposed upon two brothers who were convicted under Arizona's felony-murder and accomplice liability statutes. The brothers assisted their father and another inmate in an armed prison escape, and then participated in the armed robbery and abduction of a family of four. The father and the other inmate then "brutally murder[ed] their four captives with

repeated blasts from their shotguns." The brothers were not present at the immediate scene of the killing, and both testified that they were "surprised" by the shooting. However, neither defendant attempted to help the victims, who were abandoned in the desert. *Id.* at 141.

The Supreme Court accepted the petitioners' assertion that there was no evidence showing that they did not "'intend to kill' as that term has been generally understood in the common law." *Id.* at 150. However, the Court nevertheless concluded that on the facts before it, the death penalty was not an unconstitutionally disproportionate sanction.

> *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence — the taking of human life — the Eighth Amendment permits the State to exact the death penalty after a careful weighing of aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

Id. at 157-58.

Although the *Tison* Court did not attempt to define the "particular types of conduct and states of mind warranting imposition of the death penalty," it held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* at 158.

We conclude that the evidence of Lesko's personal involvement in the criminal episode culminating in the Miller homicide satisfies both elements of *Tison*'s fact-bound inquiry. The record clearly establishes the first element – "major participation in the felony committed." Like the Tison brothers, and unlike Enmund, Lesko was "actively involved" and "physically present during the entire sequence of criminal activity" culminating in the homicide. *Id.* at 158. His own post-arrest statement establishes that he was a major actor in the plan to rob the Stop-and-Go store, and in the subsidiary plan to lure Officer Miller into a high speed chase. Tr. at 611-12, 614-18. Finally, Lesko was physically present when Travaglia shot Officer Miller and he joined Travaglia and Rutherford in fleeing the scene of the crime.

The evidence concerning Lesko's role in the criminal episode surrounding the slaying of Officer Miller also satisfies *Tison*'s second requirement that the defendant act with a "reckless indifference to human life." After the Nicholls murder, Lesko and Travaglia directed Rutherford to obtain the bullets that were later used to kill Officer Miller. In his post-arrest statement to the police, Lesko acknowledged that he and his companions sped past Officer Miller three times, at speeds up to ninety miles per hour, in order to "draw the cop's attention" so that he would be lured into chasing them. The trio hoped to "lose" Officer Miller during a high speed chase so that they could "go and knock off the Stop-N-Go." In their third and final attempt to goad Officer Miller into a pursuit, the men drove directly toward the police car, swerving only when they were "about three feet away from it." *Id.* at 611-12, 617-18. Rutherford testified that

during the car chase, Lesko advised him to "lay down in the back, because it might turn into a shooting gallery." *Id.* at 371. There was no evidence to suggest that Lesko made any effort to dissuade Travaglia from pointing the gun at Officer Miller, or to aid the officer after the shooting. Lesko later told a friend, Daniel Keith Montgomery, that he also "wanted to" shoot Officer Miller.[22]

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22. Montgomery testified that Travaglia and Lesko met with him in a hotel room to discuss the Miller homicide. The prosecutor elicited the following testimony from Montgomery concerning Lesko's statements.

Q: All right now, when the three of you were in the room seated, what happened?

A: Michael Travaglia looked at me and said, Goddam, or Jesus Christ, I shot a cop.

Q: And John Lesko was present?

A: Yes, sir.

Q: And did he say anything?

A: Yes, sir.

Q: What did he say?

A: He said, I wanted to.

Q: I wanted to.

A: Yes.

Q: Did he say or do anything else?

A: Just kind of snickered like.

Q: He what?

A: Kind of snickered like.

Q: Laughed?

A: Ha ha, or something like that.

Tr. at 481-82.

According to Lesko's post-arrest statement to the police, he and his companions escaped by driving some fifteen miles, and then fleeing on foot. *Id.* at 612, 618.

In our view, Lesko's active and substantial role in planning the armed robbery of the convenience store, his willing participation in the scheme to lure Officer Miller away from the store by means of a dangerous high speed car chase, and his obvious indifference to the risks that this conduct posed to the police officer, combine to establish a level of personal responsibility and moral guilt sufficient to satisfy the constitutional standards set forth in *Enmund* and *Tison*.

G. *Jury discretion to consider voluntary manslaughter charge*

The trial court instructed the jury on first, second, and third degree murder and voluntary and involuntary manslaughter as to both defendants. The court's voluntary manslaughter charge, which was given at the request of defense counsel, tracked the statutory definition of the offense as a killing without lawful justification committed while the actor is under a sudden and intense passion resulting from serious provocation. 18 Pa. Cons. Stat. Ann. § 2503(a). Although the trial court believed that it was obligated to give the charge regardless of the evidence,[23] the court also reasoned that a voluntary manslaughter charge might be supported on the theory that the Miller homicide "result[ed] from a negligent

23. In an in-chambers conference with counsel, the trial judge stated: "I have some difficulty in finding how voluntary manslaughter gets in the case; but the rules are that if I am requested to charge on voluntary manslaughter, I will do it." Tr. at 1146.

manner of doing a felonious act in the pointing of a deadly weapon at a police office making an arrest or attempting to make an arrest or stopping an individual . . . ." Tr. at 1172-73.

Lesko now complains that the trial court introduced an impermissible level of arbitrariness into the jury's sentencing determination because it delivered a voluntary manslaughter instruction "even though there was no evidence that defendant was guilty of that charge." Appellant's Brief at 45. Citing *Commonwealth v. Schaller*, 493 Pa. 426, 426 A.2d 1090 (1981); *Commonwealth v. Whitfield*, 474 Pa. 27, 376 A.2d 617 (1977); and *Commonwealth v. Jones*, 457 Pa. 563, 319 A.2d 142, *cert. denied*, 419 U.S. 1000 (1974), he asserts that the Pennsylvania Supreme Court has "unequivocally held that every defendant on trial for first degree murder is absolutely entitled upon request to have the lesser included charges of third degree murder and voluntary manslaughter submitted to the jury regardless of the evidence." Appellant's Brief at 45. Lesko contends that this practice violates the plurality decision in *Roberts v. Louisiana*, 428 U.S. 325 (1976), which invalidated Louisiana's death penalty statute because, among other defects, the trial court was required to charge on non-capital degrees of murder and manslaughter even if the evidence did not support the lesser verdicts.

Contrary to Lesko's characterization of the Pennsylvania law as "unequivocal," recent Pennsylvania decisions have eviscerated the rule enunciated in *Commonwealth v. Jones* that, regardless of whether the evidence supports such a charge, "a defendant under indictment of murder will be entitled, *upon request*, to have the jury advised of its power to return a verdict of voluntary manslaughter." 457 Pa. 563, 573-74,

319 A.2d 142, 148 (Pa. 1974) (Nix, J., opinion for an equally divided court in support of affirmance) (emphasis in original).[24] However, like the trial court, we will assume that Lesko was entitled, under the governing Pennsylvania caselaw at the time of his trial, to the requested voluntary manslaughter instruction even if the evidence did not support such a charge.

We nevertheless conclude that the district court did not err in granting counsel's request for this instruction. As an initial matter, we agree with the observation of the Pennsylvania Supreme Court that "it would be anomalous to allow a defendant to request instructions on all degrees of homicide and then complain that the practice requires the vacating of his sentence of death because it

24. *See Commonwealth v. Frey*, 504 Pa. 428, 450 n.10, 475 A.2d 700, 711 n.10 (citing recent opinions to show that the *Jones* rule has "little or no vitality"), *cert. denied*, 469 U.S. 963 (1984); *Commonwealth v. Carter*, 502 Pa. 433, 466 A.2d 1328 (1983) (trial court required to charge on "unreasonable belief" subclass of voluntary manslaughter offense only when the evidence would support such a verdict); *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 73, 454 A.2d 937, 964-67 (1982) (noting the "erosion" of the *Jones* rule and stating that "any lingering notion that the *Jones* rule had constitutional underpinnings has been finally dispelled"), *cert. denied*, 461 U.S. 970 (1983); *Commonwealth v. White*, 490 Pa. 179, 185, 415 A.2d 399, 402 (1980) (trial court required to charge on involuntary manslaughter only "when the trial evidence reasonably would support such a verdict"); *Commonwealth v. Scaramuzzino*, 485 Pa. 513, 517, 403 A.2d 82, 84 (1979) (trial court instruction on voluntary manslaughter may include a statement of opinion that there is no evidence to support such a verdict); *Commonwealth v. Haynes*, ___ Pa.Super. ___, 577 A.2d 564, 574 (1990) ("[I]t is now clear that *Commonwealth v. Jones*, . . . [is] no longer valid."); *see also Hopper v. Evans*, 456 U.S. 605, 611 (1982) ("due process requires that a lesser included offense instruction be given [in a capital case] *only* when the evidence warrants such an instruction").

introduces an element of arbitrariness into the process." *Commonwealth v. Frey*, 504 Pa. 428, 450, 475 A.2d 700, 711, *cert. denied*, 469 U.S. 963 (1984). However, assuming *arguendo* that the trial evidence could not support a voluntary manslaughter verdict, we do not believe that the fact that the court instructed on that offense violates the rationale of *Roberts*. The principal defect of the capital punishment scheme overturned in *Roberts* was Louisiana's *mandatory* death penalty for first degree murder, which prevented the court from considering in its sentencing determination any "mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." 428 U.S. at 333-34. Thus, Louisiana's practice of instructing the jury on all degrees of homicide, regardless of the evidence, plainly invited the jury "to disregard their oaths and choose a verdict for a lesser offense whenever they feel that the death penalty is inappropriate." *Id.* at 335. In the plurality's view, "[t]he Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's *de facto* sentencing discretion." *Id.*

The former Pennsylvania practice in first degree murder cases of charging on lesser degrees of homicide, regardless of the evidence, is not analogous to the situation addressed in *Roberts*. Unlike Louisiana's mandatory death penalty law, Pennsylvania's death penalty statute provides adequate standards to guide the sentencing determination, and permits the sentencing jury to "consider and give effect to all mitigating evidence." *Blystone*, 110 S. Ct. at 1082 (1990). *See also Zettlemoyer*, slip op. at 16 ("[The] unrestricted

consideration of mitigating circumstances [under the Pennsylvania death penalty statute] clearly meets the Eighth Amendment's requirements."). Under Pennsylvania's scheme, unlike Louisiana's, a jury considering a first degree murder charge is not likely to return a verdict for an unsupported non-capital charge simply because the circumstances of the crime or the defendant do not warrant the extreme sanction of death. Instead, a Pennsylvania jury is able to return a first degree murder verdict with confidence that it will later have the opportunity to decide whether to impose a death sentence.

The non-mandatory nature of the Pennsylvania's death penalty, the jury's ability to consider the full range of mitigating evidence, the standards guiding the jury's sentencing discretion, and the meaningful state appellate review of death penalty cases fully meet the concerns expressed by the *Roberts* plurality about the potential for arbitrary results arising from an instruction on an unsupported non-capital verdict. Thus, the trial court's voluntary manslaughter instruction was not a constitutional error.

H. *Defendant's Burden to Establish Mitigating Circumstances by a Preponderance of the Evidence*

Lesko argues that Pennsylvania's death penalty statute is unconstitutional because it provides that "mitigating circumstances must be proved by the defendant by a preponderance of the evidence." 42 Pa. Cons. Stat. Ann. § 9711(c)(iii). However, the Supreme Court recently considered, and rejected, a similar challenge to Arizona's death penalty statute. In his plurality opinion in *Walton v. Arizona*, 110 S. Ct. 3047 (1990), Justice White concluded that imposing such a burden on capital defendants does not violate the constitution.

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

Id. at 3055 (citation omitted).[25]

Under Pennsylvania's death penalty statute, the Commonwealth is not relieved of its burden to prove every element of the offense and to establish the existence of aggravating circumstances. Furthermore, the statute allows the sentencing jury to evaluate and give effect to the full range of relevant mitigating evidence. *Blystone*, 110 S. Ct. at 1082. Therefore, we find no constitutional defect in Pennsylvania's requirement that a capital defendant prove mitigating circumstances by a preponderance of the evidence.

I. *Admission of Evidence of Nicholls Murder*

Lesko asserts that his due process rights were violated by the introduction of evidence at the guilt phase of his trial concerning the "gruesome details" of the Nicholls murder. He argues that this evidence was relevant only to establish "bad character," and not to show intent or motive.

25. In his *Walton* concurrence, Justice Scalia stated that because of the "irreconcilable conflicts" in the Supreme Court's jurisprudence on death penalty sentencing, he "will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted." 110 S. Ct. at 3068 (Scalia, J., concurring). Thus, Justice Scalia's concurrence provided the fifth and decisive vote for the more limited plurality holding.

However, we have determined this issue adversely to Lesko in our prior decision, in which we held that the evidence of the prior crime was probative of intent and motive, and that it was not unduly prejudicial. We then noted that

> given the probative value of Rutherford's testimony as to Lesko's motive to kill Officer Miller, and to refute his self-portrayal as a passive observer, we do not find that the prejudicial impact [of the evidence of the Nicholls murder] outweighs its probative value — no less that it does so in a manner so conspicuously as to rise to the level of a constitutional violation.

Lesko, 881 F.2d at 55.

Because we are bound by the holding of the prior panel opinion,[26] we must decline Lesko's invitation to reexamine this issue.

III. *CONCLUSION*

Given the lengthy and tortured procedural history of this case, and the emotional responses evoked by capital punishment cases generally and by this case in particular, a brief comment is appropriate on our decision to remand this case for additional proceedings.

Whatever views one might have on capital punishment, one must acknowledge that this intermediate appellate court is not the final arbiter of either the legality or morality of the death penalty. So long as this sanction remains in use, one must further concede that no rational purpose is served by drawn out and repetitive litigation that simply delays the ultimate resolution of death

26. Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, Chapter 9.1.

penalty matters. However, it also cannot be denied that the very nature of capital punishment demands a scrupulous inquiry into the adequacy of state court evidentiary hearings in death cases. The importance of this inquiry was well stated by the Supreme Court in *Ford v. Wainwright*, 477 U.S. 399 (1986).

> In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. *See, e.g., Spaziano v. Florida*, 468 U.S. 447 (1984). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different. *See Woodson v. North Carolina*, 428 U.S. 280 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).
>
> Although the condemned prisoner does not enjoy the same presumptions accorded a prisoner who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being.

477 U.S. at 411 (plurality opinion).

For the reasons stated in this opinion, we will reverse the judgment under review to the extent that it sustains the imposition of the death penalty. We will remand to the district court for the holding of an evidentiary hearing on the appellant's claim that his Indiana County guilty plea was not voluntary and for the subsequent

issuance of the writ insofar as the death penalty is concerned.

We will direct the district court to issue the writ subject to the holding of a state court resentencing proceeding within a reasonable period of time to be set by the district court. If the district court determines, on the basis of the evidentiary hearing described in the last paragraph, that the appellant's Indiana County guilty plea was not voluntary, the writ shall be issued subject to the additional requirement that evidence of the guilty plea not be introduced at the resentencing proceeding.

We will affirm the judgment under review to the extent that it sustains the determination of appellant's guilt.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT

CIVIL ACTION NO. 86-1238

JOHN CHARLES LESKO,
Petitioner

v.

GLEN R. JEFFES, COMMISSIONER
OF THE PENNSYLVANIA DEPARTMENT
OF CORRECTIONS, et al.,
Respondents

ORDER

AND NOW, this 12th day of April, 1990, after a petition for a writ of habeas corpus was filed by John Charles Lesko, and after the Report and Recommendation of the United States Magistrate was filed and the parties were granted ten days to file objections thereto, and upon consideration of the objections filed by the petitioner and

the response thereto submitted by the respondents, and upon independent review of the petition and the record, from which it appears that the petitioner's allegations are without merit, and upon consideration of the Report and Recommendation of the Magistrate which is adopted and incorporated as the opinion of this Court,

IT IS ORDERED that the petition of John Charles Lesko for a writ of habeas corpus is dismissed and that a certificate of probable cause is granted.

s/Alan N. Bloch
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

JOHN CHARLES LESKO,
Petitioner

vs.

GLEN R. JEFFES, COMMISSIONER
OF THE PA. DEPT. OF
CORRECTIONS, et al.,
Respondents

Civil Action No. 86-1238

O R D E R

AND NOW, this 19th day of March, 1990, the Magistrate's Report and Recommendation having been filed,

IT IS ORDERED that the parties shall have ten (10) days in which to file objections to said Report and Recommendation. Failure to file timely objections may constitute a waiver of any appellate rights.

s/ Robert C. Mitchell
ROBERT C. MITCHELL
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

JOHN CHARLES LESKO,
Petitioner

vs.

GLEN R. JEFFES, COMMISSIONER
OF THE PA. DEPT. OF
CORRECTIONS, et al.,
Respondents

Civil Action No. 86-1238

MAGISTRATE'S REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully reccommended that the petition of John Charles Lesko for a writ of habeas corpus be dismissed, but that a certificate of probable cause be granted.

II. Report

John Charles Lesko, by his court appointed counsel, has presented a petition for a writ of habeas corpus which

he has been granted leave to prosecute in forma pauperis.

Lekso is presently incarcerated at the State Correctional Institution at Graterford, awaiting execution, following his conviction, by a jury of first degree murder at No. 681 of 1980, in the Court of Common Pleas of Westmoreland County. Pennsylvania. This sentence was imposed on April 23, 1982.

An appeal was taken to the Pennsylvania Supreme Court and on September 29, 1923, the judgment of sentence was affirmed. Commonwealth v. Travaglia and Lesko, 502 Pa. 474 (1983), cert. denied 467 U.S. 1256 (1984), rehearing denied 468 U.S. 1226 (1984).

The petitioner thereupon submitted a post-conviction petition to the Court of Common Pleas which was denied and the denial affirmed on appeal. Commonwealth v. Lesko, 509 Pa. 67 (1985), rehearing

denied 509 Pa. 625 (1986), cert. denied 479 U.S. 1101 (1987).

While the latter petition for certiorari was pending, the petitioner commenced a federal collateral challenge to his conviction. On June 12, 1986 a stay of execution was granted by this Court. His state court remedies having been exhausted,[1] Lesko alleges he is entitled to relief on the grounds that:

> 1. Petitioner's death sentence was imposed in violation of a prior plea agreement in which the petitioner pled guilty to second degree murder.
>
> 2. An inflammatory closing argument was presented by the prosecutor during his closing argument during the penalty phase of the trial.

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[1]See Lesko v. Owens, 881 F.2d 44, 50 (1984), cert. denied 110 S.Ct. 759 (1990).

3. The prosecutor improperly commented on the petitioner's failure to testify during the penalty phase of the trial.

4. The court improperly instructed the jury not to consider sympathy for the defendant during the penalty phase of the trial.

~~5.~~ The Pennsylvania death penalty is unconstitutional on its fact.

6. The Pennsylvania death penalty is unconstitutional as applied.

7. The death penalty is disproportionate to the petitioner's role as an accomplice.

8. In violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985), the death penalty was improperly imposed by a jury from which a member of the venire had been excluded because of her opposition to the death penalty.

9. Evidence of another crime, which comprised a separate and isolated episode, transaction or occurrence was improperly introduced during the trial.

10. Inflammatory and irrelevant evidence of another type was introduced at the trial and served to inflame the jury.

11. Evidence secured as a result of an unlawful search and seizure was introduced at trial.

12. Petitioner's confession was secured in violation of his Miranda rights and introduced at trial.

13. Criminal conspiracy was jointly charged with murder in violation of Pennsylvania procedural law.

14. The court failed to instruct the jury that an accomplice could be guilty of a different degree of murder than the primary actor.

15. Evidence from a photographic line-up was introduced although counsel was not present at that line-up.

16. Petitioner was denied a speedy trial in violation of Rule 1100 and the Sixth and Fourteenth Amendments.

17. In reviewing the death sentence, the Pennsylvania Supreme Court did not consider the proportionality of a death

sentence on a passive accomplice or the petitioner's personal history.

18. The Pennsylvania Supreme Court considered matters dehors the record in determining the appropriateness of the death sentence.

19. The Court of Common Pleas denied the petitioner a full and fair hearing when it refused to hold an evidentiary hearing in conjunction with the post conviction proceedings.

Upon finding that the petitioner had exhausted his state court remedies, and upon further finding that the admission of testimony from Ricky Rutherford was an error of constitutional magnitude, the writ issued.[2] Lesko v. Jeffes, 689 F.Supp. 508 (W.D. Pa. 1988). On appeal of this limited issue, the Court of Appeals reversed and remanded the matter for consideration of the other claims raised in the petition. Lesko v.

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[2]This is issue number 9 as set forth above.

Owens, 881 F.2d 44 (3d Cir. 1989), cert. denied 110 S.Ct. 759 (1990). The matter was then referred to the undersigned United States Magistrate for Report and Recommendation in accordance with the mandate of the Court of Appeals.

The facts of the crime are fully set forth in the Opinion of the Court of Appeals, and are repeated here to place matters in proper perspective.

> In the early hours of January 3, 1980, John Lesko, Michael Travaglia and Richard Rutherford were cruising the outskirts of the city of Pittsburgh in a stolen sports car. The trio drove past police officer Leonard Miller, sitting in his patrol car parked at the side of the road outside the Stop-and-Go convenience store. Travaglia, the drive of the car, stated that he "wanted to have some fun with this cop." Travaglia raced past the officer's car beeping his horn, but no pursuit followed. Travaglia turned the car around, again sped past the patrol car, and again failed to

elicit a response. The third time Travaglia sped past, Officer Miller turned on his lights and gave chase. Lesko turned to Rutherford in the back seat and cautioned him to "lay dow in the back, because it might turn into a shooting gallery."

A moment later, Officer Miller managed to force the sports car off the side of the road. The officer approached the car on foot. Travaglia rolled down his wingo, extended his .38 caliber hand gun, and shot Officer Miller twice from close range. Officer Miller returned fire, shattering the passenger side of the window. The three companions sped away. The gun wounds Officer Miller received proved fatal.

The trial had begun their escapade together a few hours earlier, in the late evening of January 2, 1990 at a hot dog shop in Pittsburgh. Travaglia's instruction, Lesko and Rutherford went to the alleyway behind the Edison Hotel, and waited. About ten minutes later a sports car appeared. Travaglia sat in the front seat beside the drive and owner of the car, William Nicholls, a stranger. While Lesko and Rutherford were climbing into the back seat, Travaglia pulled out a .22 caliber hand gun and shot Nicholls in the arm.

After Travaglia took the driver's seat, Lesko told Rutherford to handcuff Nicholls behind the back. As Travaglia drove, Lesko repeatedly punched Nicholls in the face and chest, calling him a queer. Lesko asked Nicholls if he wanted to perform oral sex on him, and taunted him with a knife. Meanwhile, Lesko took Nicholls's belongings, a wallet and an extra set of keys, and told Rutherford to place them in the glove compartment. After Nicholls lost consciousness, Rutherford and Lesko gaged him with a scarf. Travaglia stopped the car near a lake in a wooded area. Lesko propped Nicholls against a nearby tree, his hands cuffed, his mouth gagged, and his feet bound with a belt. Travaglia and Lesko dragged Nicholls down to the lake and rolled him into the water, where he disappeared.

The three men drove to Travaglia's father's house, where Travaglia knew his father kept a gun. Lesko and Rutherford waited in the car while Travaglia entered the house. Travaglia returned with a .38 caliber handgun, which he handed to Lesko. Upon inspection, Lesko discovered that it contained only bird shot. Travaglia, who had begun driving away, turned the car around and returned to his father's house. Travaglia

instructed Rutherford to retrieve the box of bullets lying in the trunk of the car parked inside the garage. Lesko stood guard outside. Armed with the un that had wounded Nicholls, Lesko warned Rutherford that is anything went wrong, Rutherford "had six shots to get out." Rutherford returned with the box of bullets, and the trio drove off. It was these bullets that killed Officer Miller.

After the Miller shooting, Lesko and Travaglia returned to Pittsburgh. At the hot dog shop they met a friend, Keith Mongtomery, "I shot a cop." Lesko added, "I wanted to." Travaglia then gave Montgomery the .38 caliber gun used to shoot Officer Miller. When the Pittsburgh police found Montgomery with that same gun later that evening, Montgomery told the police how he had gotten the gun, and that it had been used to shoot a policeman. Lesko and Travaglia were arrested that night. Before surrendering, Lesko pointed a gun at the police.

After receiving Miranda warnings, Lesko and Travaglia each gave statements admitting involvement in the killing of Officer Miller. 881 F.2d at 46-47.

The issues which the petitioner seeks to raise here can for ease of discussion be divided into three separate categories.

The first issue presented, which is in a category of its own, regards the fact that the petitioner's death sentence was allegedly imposed in violation of a prior plea agreement in which the petitioner pled guilty to second degree murder in Indiana County.

The second category of issues, that is, issues eight, ten through sixteen and issue nineteen concern the trial and post-conviction proceedings. The one additional issue raised by the petitioner, issue nine has already been decided of by this Court and the Court of Appeals.

I. Violation of the plea agreement

The petitioner contends that the death penalty as imposed was imposed in

violation of a prior plea agreement which induced Lesko to plead guilty to a second degree murder charge at No. 35 Crim. 1980 in Indiana County stemming from the Nicholls murder.[3] It is urged here, that as part of the Indiana County plea agreement, the petitioner was not to be sentenced on the Indiana charge until after the trial was completed in Westmoreland County, thereby argues the petitioner impliedly assuring that the Indiana conviction could not be used as an aggravating factor during the penalty phase of the Westmoreland trial.[4]

This issue in reality has two parts. The first concerns whether or

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[3]The denial of leave to withdraw the Indiana County guilty plea was affirmed on appeal. Com. v. Lesko, 502 Pa. 511 (1983).

[4]See Judge Cowan's dissent in Lesko, 881 F.2d at 65-73.

not a plea agreement had been reached which barred the introduction of the Indiana conviction during the Westmoreland trial, and the second part of that issue is whether a hearing should have been held on this matter.

This factor becomes critical because under the Pennsylvania guidelines for sentencing those convicted of first degree murder, one of the aggravating circumstances which may be shown is that,

> The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was impossible or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense. 42 Pa.C.S.A. § 9711(d)(10).

Counsel for the Petitioner new argues that:

> In determining whether the introduction of petitioner's Indiana County guilty plea at

> the Westmoreland County penalty trial was improper, it was necessary to consider not only the express terms of the plea bargain but also the implicit understanding of the parties and, most importantly, any representations concerning the agreement made to the petitioner by his attorney.

Because the state courts refused to hold a hearing on this matter, the petitioner now contends that this Court should conduct such a hearing.[5]

There does not appear to be any doubt that the petitioner's Indiana County plea was motivated in part by the agreement that sentence not be imposed until after the Westmoreland trial on petitioner's mistaken belief that the unsentenced Indiana conviction could not be used during the penalty phase of the

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[5]We note that a hearing was held on the motion to withdraw the Indiana County guilty plea but petitioner's counsel could not testify at that hearing.

Westmoreland trial. Com. v. Lesko, 502 Pa. at 514. After a hearing on this matter, and as affirmed by the Pennsylvania Supreme Court, this was a calculated defense strategy which was unsuccessful. Yet as the Supreme Court noted in reviewing the Indiana conviction,

> Rather than deeming trial counsel's actions ineffective, we find it was a reasonable attempt to prevent an almost certainty from occurring. If the Appellant has been tried on May 19, 1980 as scheduled [in Indiana County], there is no question that the prosecutor could have offered sufficient evidence to warrant a guilty verdict. This is clear from a review of the guilty plea colloquy. Thus, a conviction and sentencing would have occurred prior to the trial in Westmoreland County. Accordingly, under any interpretation...the Appellant's conviction would be admissible in the Westmoreland County case as an aggravating circumstances. Trial counsel attempted to avoid this certainty by preventing sentencing until the Westmoreland County case was completed. It was hoped that by following this course, the Westmoreland County

> judge would disallow the Indianna County guilty plea from being introduced in the penal phase of the trial as an aggravating circumstance, because no sentence had been imposed in the Indiana County. However, three Westmoreland County trial judge correctly determined that the plea was admissible. Com. v. Lesko, 502 Pa. at 516.

In the appeal from the denial of post-conviction relief from the Westmoreland conviction, the Court noted that the Indiana plea colloquy did not contain any agreement that the conviction could not be used as an aggravating circumstance, Com. v. Lesko, 509 Pa. at 85, and merely noted trial counsel's belief that there was an "implicit" agreement that it would not be so used.

This factual conclusion by both the trial and appellate courts is entitled to a presumption of correctness, Barry v. Brower, 864 F.2d 294 (3d Cir. 1988),

and the presumption has not been rebutted.

In support of his request for an evidentiary hearing in this Court, the petitioner alleges that because he was represented by trial counsel at the hearing on his request to withdraw the Indiana plea, counsel was in fact unavailable to testify regarding the "implicit" understanding. As the Court noted in the post-conviction appeal, counsel's representation that there was such an agreement was heard by both the post-conviction court, and acknowledged by the appellate court, and yet, rejected in view of the complete plea colloquy hearing. Com. v. Lesko, 509 Pa. at 84-87. Thus, there does exist a full record on this issue, and a further hearing is not necessary. Mayberry v. Petsock, 821 F.2d 179 (3d Cir. 1987),

cert. denied 484 U.S. 946 (1987). Accordingly, this issue is without merit.

II. The capital issues

Issues two through seven as well as issues seventeen and eighteen focus on some aspect of the Pennsylvania death sentence or the specifics of that sentence as it was applied to the petitioner. The applicable statute, 42 Pa.C.S.A. § 9711 provides in part:

> After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment.
>
> In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified...
>
> The verdict must be a sentence of death if the jury unanimously finds at least one

> aggravating circumstance...and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases...

That is, as the Supreme Court observed in Blystone v. Pennsylvania, 58 L.W. 4274, 4275 (1990), "death is not automatically imposed upon conviction for certain types of murder. It is imposed only after a determination that the aggravating circumstances outweigh the mitigating circumstances." The Court in Blystone at 4276, summarizes its teachings on capital sentencing by citing a passage from McCleskey v. Kemp, 481 U.S. 279, 305-306 (1987):

> In sum, our decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot

> be imposed. In this context, the State must establish rational criterial that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Against these criteria, and with these teachings in mind, we examine the various issues regarding the sentence which the petitioner raises here.

The first two issues, issues two and three concern the allegedly inflammatory closing argument of the prosecutor during the penalty phase of the trial and his comment on the petitioner's failure

to testify during that portion of the trial.

During his closing argument to the jury, the prosecutor stated:

> So I'll say this: Show them sympathy. If you feel that way, be sympathetic. Exhibit the same ympathyy that was exhibited by these men on January 3rd, 1980. No more.
>
> I want you to remember this: we have a death penalty for a reasons. Right now, the score is John Lesko and Michael Travaglia two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's you duty. (TT. 1701-1702).

However, these comments must be viewed in the context in which they were presented. The petitioner and his co-defendant had been convicted of first degree murder. Thereupon, the jury was asked to consider which penalty, death or life in prison should be imposed. Counsel for the petitioner and counsel

for his codefendant had just completed their arguments to the jury in which they had stated that the death penalty served no purpose; that the death penalty should never be imposed and in vivid detail had set forth the gruesome nature of electrocution. (TT. 1665-1683). As the Pennsylvania Supreme Court observed when it reviewed these comments.

> As we read the record, the arguments presented by defense counsel were to a large extent directed toward demonstrating that there was no rational reason for the existence of the death penalty, that it served no useful purpose. The prosecutor opened his argument by pointing out that the legislature in its lawmaking function had enacted the death penalty and had already decided that there is a rational reason and that the penalty does serve a useful purpose. He returned to this theme, and prefaced the comment complied of by requesting "I want you to remember this: We have a death penalty for a reason."...taken in context, we find the prosecutor's comment to have been no more than permissible "oratorical

flair" in arguing in favor of the death penalty. Comm. v. Travaglia and Lesko, 502 Pa. at 502-503.

Where a question of alleged prosecutorial misconduct is raised, the question before the court is whether the conduct so infected the trial with unfairness that the resulting conviction was a denial of due process. Darden v. Wainwright, 477 U.S. 168 Pa. (1986).

A full reading of the closing argument of the prosecutor when taken in context and in view of the fact that he was responding to the emotional attacks made on the death sentence by the defense counsel, leads to the conclusion that a due process violation did not occur, and thus this issue is not a basis for relief.

The second issue regarding the closing argument of the prosecutor is focused on whether or not the prosecutor

unfairly commented on the petitioner's failure to testify. Specifically, this argument focused on the penalty phase of the trial during which Lesko elected to testify for the limited purpose of presenting his pathetic family background as mitigating evidence. (TT. 1651-1662). During his closing, the prosecutor stated:

> Consider the testimony you heard as to prior criminal convictions. None at all was presented by the defendant Lesko... (TT. 1691).
>
> ...And I want you to consider that, John Lesko took the witness stand, and you've got to consider his arrogance. He told you about how rough it was, how he lived in hell, and he didn't even have the common decency to say I'm sorry for what I did. I don't want you to put me to death, but I'm not even going to say that I'm sorry.

In Estelle v. Smith, 451 U.S. 454, 462-463 (1981) the Court stated:

> We can discern no basis to distinguish between the guilt and

> penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the Stat is not relieved of the obligation to observe fundamental constitutional guarantees...Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.

The Court then concluded that statements made by the respondent to his treating psychiatrist without prior warnings could not be introduced against him during the penalty phase of his trial.

In the present case, the statements which the petitioner points to concern comments regarding the petitioner's alleged lack of remorse during his limited testimony. Initially, it would appear that the prosecutor's comments were not directed at his failure to testify in violation of the Fifth Amendment

but rather were directed at the entirety of the petitioner's plea for leniency in view of his miserable childhood after having been convicted of such a heinous crime. Furthermore, any possible prejudice which might have arisen from this statement was mitigated by the instructions of the trial court which explained that a criminal defendant is never under an obligation to testify. (TT. 1267).

Thus, the two issues regarding the prosecutor's closing arguments do not provide a basis for relief.

The next issue which the petitioner raises here, issue number four, alleges that the court improperly instructed the jury not to consider sympathy for the petitioner during the penalty phase of the trial. When called upon to review a trial court's instructions, a federal habeas corpus court must review those

instructions in their entirety rather than one particular isolated instruction. Francis v. Franklin, 471 U.S. 307 (1985).

In the instant case, during the penalty phase of the trial, Lesko offered evidence of his troubled pathetic childhood as a mitigating circumstance. (TT. 1627-1662). Based on this testimony, petitioner's counsel argued that his background should be considered in determining any mitigating factors (TT. 1670-1672). Following the closings, the court instructed the jury:

> Remember and consider all of the evidence, giving it the weight to which you deem it entitled. Your decision should not be based on sympathy, because sympathy could improperly sway you into one decision into a decision imposing the death sentence, or could improperly sway you against the decision of imposing the death sentence. Sympathy is not an aggravating circumstance; it is

> not a mitigating circumstance. (TT. 1706).

The petitioner now argues that this instruction was improper.

In California v. Brown, 479 U.S. 538 (1987), the Court was called upon to review a penalty phase instruction in which the trial court stated that the jury in considering aggravating and mitigating circumstances, "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." These instructions were determined to be permissible in that:

> even a juror who insisted on focusing on this one phrase in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase...We think a reasonable juror would...understand the instruction not to rely on "mere

> sympathy" as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase. 479 U.S. at 542.

In the instant case, the court instructed the jury not to regard sympathy per se as either an aggravating or a mitigating factor, but rather instead directed the jury to consider "any other mitigating matter concerning the character or record of the defendant..." And, explained that mitigation need only be proven by a preponderance of the evidence while the Commonwealth had to prove aggravating beyond a reasonable doubt. (TT. 1704-1705). Thus, the jury was in no way prohibited from considering any possible mitigating factors in reaching its decision. Lockett v. Ohio, 438 U.S. 586 (1987). Accordingly, it would appear that the jury was not improperly instructed, and that this

allegation cannot provide a basis for relief.

The next issue which the petitioner urges entitles him to relief is issue number five in which it is urged that the Pennsylvania death penalty is unconstitutional on its face. This issue, as has been previously noted, had been conclusively determined by the Supreme Court in Blystone v. Pennsylvania, supra. and does not afford a basis for relief here.

Petitioner next urges in issue number six that he is entitled to relief on the grounds that the Pennsylvania death penalty is unconstitutional as applied. In this regard, he specifically contends that the Pennsylvania death penalty statute is unconstitutional as applied in that the jury in a capital case is allowed to convict a defendant of a

non-capital crime even when there is no evidence to sustain such a verdict.

In Pennsylvania, and upon request, every defendant on trial for first degree murder is entitled to a jury instruction on the lesser offenses of third degree murder and voluntray manslaughter. Commonwealth v. Schaller, 493 Pa. 426 (1981). However, the law in Pennsylvania does not make such an instruction mandatory, unless the evidence at trial would justify such a verdict. Commonwealth v. Frey, 504 Pa. 428 (1984). This is in conformity with the federal requirement. Beck v. Alabama, 447 U.S. 625 (1980) which was clarified by the Court in Hopper v. Evans, 456 U.S. 605, 611 (1982) wherein it is stated:

> Beck held that due process requires that a lesser included offense instruction be given when the evidence warrants such

> an instruction. But due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction.

The purpose of this requirement, the Court in Beck explained is to eliminate arbitrary jury verdicts which permits a verdict which is either unsupported by the evidence of coerces either a guilty or not guilty verdict where another verdict is feasible.

Lesko now argues that the trial court impermissibly instructed the jury on voluntary manslaughter during the guilt phase of the trial (TT. 1287-1288), even though there was no evidence which would have supported such a verdict.

The Pennsylvania Crimes Code provides in 18 Pa.C.S.A. § 2501(b) that "Criminal homicide shall be classified as murder, voluntary manslaughter, or involuntary manslaughter." Section

2503(a) of 18 Pa.C.S.A. provides that "A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by (1) the individual killed; or (2) another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed."

The testimony during the trial was such that it might have been conceivable for a jury to convict the petitioner of voluntary manslaughter, in that the history of the crime revealed that after several attempts to provoke Officer Miller, he finally gave chase which resulted in the homicide. In addition, in giving such an instruction, the court was following defense counsel's request for instructions on second degree murder

and instructions that Lesko as the accomplice could be convicted of a lesser offense than the principal actor. The court, without objection, specifically advised counsel that:

> I formally discussed by ruling about not incorporating involuntary manslaughter. That inclusion evidence about drugs is not a determinant factor; that the Court has now discussed with counsel two other issues, namely, being voluntary manslaughter resulting from a negligent manner of doing a felonious act in the pointing of a deadly weapon at a police officer making an arrest or attempting to make an arrest or stopping an individual which is a felony. And in view of the fact there is a second shot, that takes it out of the realm of possible involuntary manslaughter. (TT. 1172-1173).

It would appear that the trial court believed that a verdict of voluntary manslaughter was not inconceivable and based on this determination, as appears to be supported by the trial record, the instruction was delivered. In essence,

this is a situation in which the petitioner was given the benefit of every possible doubt and the jury instructed that it could return a voluntary manslaughter verdict. (TT. 1287-1288).

Thus, under the circumstances presented here, the instruction on voluntary manslaughter was not unconstitutional, and does not provide a basis for relief.

The next issue which Lesko presents, issue number seven, is that the death penalty is disproportionate to his role as an accomplice and co-conspirator. Specifically, the petitioner argues that as an accomplice to the murder rather than the actual murderer he would not be subjected to the death penalty. It is provided in 18 Pa.C.S.A. 306(c) that:

> A person is an accomplice of another person in the commission of an offense if (1)

> with the intent of promoting or facilitating the commission of the offense he (i) solicits such other person to commit it or (ii) aids or agrees or attempts to aid such other person in planning or committing it or (2) his conduct is expressly declared by law to establish complicity.

In a similar manner he argues that as a co-conspirator under 18 Pa.C.S.A. § 903 he should not be subjected to the same severe penalty as the actor. The petitioner is this section of his brief does not argue that he could not have been convicted of first degree murder as an accomplice or co-conspirator, but rather that the imposition of the death penalty is disproportionate to his role in the crime. I this regard, the petitioner relies on Enmund v. Florida, 458 U.S. 782 (1982). In Enmund the question presented to the Court in the petition for certiorari was:

> Whether a death sentence imposed upon a defendant convicted

> of felony murder is disproportional to the crime in violation of the Eighth and Fourteenth Amendments to the United States Constitution, where the death sentenced defendant did not actually kill the murder victim; was not actually present at the scene of the killing; did not intend the death of the victim; and was convicted solely as an aider and abettor to the robbery which provided the underlying felony for the felony murder conviction?

In answering this question in the affirmative, the Court observed that the record supported no more than an inference that Enmund was the individual sitting in the car while two other individuals went to the Kersey home where they demanded money, pointed a gun, and when one of the Kerseys appeared with a gun and shot one of the robbers, then shot and killed both of the Kerseys, dragged them into the kitchen of their home, took their money and fled. The Court

continued that:

> This was enough under Florida law to make Enmund a constructive aider and abettor and hence a principal to first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings' also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments. 458 U.S. at 788.

The Court in Enmund observed that Enmund's sole involvement, at best, was as an aider in a robbery and emphasized that the focus must be on his culpability, and not on those who both committed the robbery and the murder. 458 U.S. at 798. The Court concluded:

> For purposes of imposing the death penalty, Enmund's criminal culpability must be limited

> to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. 458 U.S. 801.

Accordingly, the death sentence was vacated.

Against this background, it is important to determine Lesko's role in bringing about the death of Officer Miller.

It is undisputed that on January 3, 1980, the petitioner, Travaglia and Rutherford were seeking to rob a local convenience store. As they approached the store they discovered that a police officer was parked near the store. Thus, in an effort to lure the officer away from the store and to have some fun, they on two occasions unsuccess-

fully attempted to antagonize the officer and finally on their third try, the officer gave chase. At that time Lesko turned to Rutherford who was in the back seat of the vehicle and warned him to hide since events might "turn into a shooting gallery." When Officer Miller finally stopped their vehicle Travaglia fired the fatal shots at him. Subsequently, the petitioner in relating the events to another individual related that he had wanted to shoot the officer. 881 F.2d at 46-47. For this reason, it would appear that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." Tison v. Arizona, 481 U.S. 137, 158 (1987).

Thus, unlike Enmund who went to participate in a robbery and was waiting

outside the home while unbeknownst to him the homicides occurred, the petitioner here, as a major participant, was riding as a passenger in the vehicle, and acted with deliberate indifference when he recognized that a shooting might reasonably be anticipated and in fact later stated that he had wanted to perform the execution. Based on these facts it cannot be said that Lesko was without participation and culpability in causing the homicide. For this reason the holding in Enmund is inapplicable to the facts of this case, and does not provide a basis for relief.

The next issue raised by the petitioner, issue seventeen, raises the question of the Pennsylvania Supreme Court's alleged failure to consider the proportionality of a death sentence on a passive accomplice or the petitioner's past history. In Tison v. Arizona,

supra the Court held that major participation as well as reckless indifference must be weighed in imposing a death penalty. The petitioner now alleges that the Pennsylvania Supreme Court failed to weigh Lesko's individual participation in that he was "simply...a passenger in the vehicle..." This contention is without merit. The Pennsylvania Supreme Court had the entire record before it which indicated the petitioner's participation as outlined above. Furthermore, the Court engaged in a "Proportionality Review" and stated:

> We have searched the records of these [other] cases available to this Court for information as to the character of the defendants (e.g. intelligence, family background, psychiatric history, previous criminal record), and the circumstances, both aggravating and mitigating, of their crimes. We find that the sentence of death is not excessive or disproportionate to the penalty imposed

> in these similar cases. We also find that the evidence supports "the finding of an aggravating circumstances specified... and that the sentences were not "the product of passion, prejudice or other arbitrary factor"... 502 Pa. at 505.

Thus, this issue is without merit.

The final issue, issue number eighteen, alleges that the Pennsylvania Supreme Court considered matters dehors the record in determining the appropriateness of the death sentence. This argument is based on an allegation that when reviewing the denial of Lesko's post-conviction petition, the Supreme Court of Pennsylvania made comments at 509 Pa. 72-73 regarding aspects of the Nicholls killing which were not a part of the Westmoreland County trial record. Specifically, it is indicated that the Court stated:

> Still in Nicholls's car, with his belongings and a gun which

> connected them to another killing which occurred within a week of the killings of Nicholls and Miller and to a series of robberies of convenience stores in Indiana and Westmoreland Counties within the same time frame, appellant and his accomplice encountered Officer Miller, enticed him into a chase, pulled over and killed him as he approached their stopped vehicle.

While it is true that the Court made this observation in denying post-conviction relief, it is also apparent that the Court in no way relied on this information and more or less included it in the discussion to convey a full understanding of the background upon which the conviction was based. Thus, this issue is without merit here.

III. <u>The non-capital issues</u>

The third category of issues which the petitioner seeks to raise here, that is issues eight, ten through sixteen and issue nineteen involve matters which

occurred during the trial or post-conviction proceedings.

The first issue, issue number eight concerns the fact that a member of the venire was excluded because of her opposition to the death penalty allegedly in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985).

Jury selection commenced on January 5, 1981[6] in Berks County to which it had been removed for the purpose of selecting a jury which had not been exposed to the pretrial publicity. One of the persons called, Esther Kroh was asked whether she had any conscientious scruples against imposing the death

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[6]Record references in this discussion are to the transcript of the jury selection proceedings which commenced on January 5, 1981 and are marked "J.S."

penalty and responded negatively (J.S. 255). However, when asked, "if you were placed into that situation [imposing either a life or death sentence] would you automatically vote one way or the other irrespective of the evidence or the law that was given to you?" (J.S. 255-256). To this inquiry she responded, "Well, I think I would vote either way." (J.S. 256). However, she then was asked, "...if you had to make a decision as to whether or not you would impose the death penalty or impose a sentence of life, simply because the victim in this case was a police officer, would you then irrespective of the other evidence that you heard vote automatically for the death penalty?" (J.S. 260). To this inquiry she responded, "No sir. I'm opposed to the death penalty." (J.S. 260).

The Court then inquired:

> Are you saying under all circumstances, that irrespective of what evidence was given to you, because you are opposed to the death penalty, you could not participate in imposing the death penalty upon somebody, irrespective of what evidence was given to you? (J.S. 261).

To this inquiry she responded, "Well, I am opposed, yes." (J.S. 261).

While the defense counsel had found Ms. Kroh acceptable, the prosecution challenged her for cause (J.S. 261), and the Court ruled "under the situation as observed and determined by this Court, this juror is not qualified to serve." (J.S. 262).

In Witherspoon v. Illinois, 391 U.S. at 522 n.21 (1968), the Court held that a juror may not be excluded unless he is unwilling to consider the possible penalties which might be imposed and indicates that he is irrevocably committed

before the trial commences. This holding was further examined in Wainwright v. Witt, 469 U.S. at 424 (1985) wherein the Court explained that the correct "standard is whether the juror's views [on capital punishment] would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Because of the difficulty of making a determination of a juror's bias, the Court held that this should generally be left to the determination of the trial judge who can view and weigh the responses of prospective jurors. 469 U.S. at 426. Finally, the Court in Witt concluded that a juror who responsed that she "believed" that her personal beliefs would interfere with her impartiality, was properly excluded. 469 U.S. at 430-431.

In the instant case, the juror expressed the belief that she could not vote to impose the death penalty, and based on all the surrounding circumstances, the trial judge ruled that she could not be an impartial juror. This factual determination, which has not been rebutted is entitled to a presumption of correctness, Barry v. Brower, supra, and does not provide a basis for relief.

The next issue, issue number ten, concerns the introduction of allegedly inflammatory and irrelevant evidence of another crime which the petitioner argues served to inflame the jury. Specifically, Lesko maintains that the evidence of his participation in the killing of William Nicholls, prior to the killing of Officer Miller, which he alleges was a separate and isolated episode, transaction or occurrence, should

not have been admitted in his prosecution for the Miller homicide.

As a general proposition, evidentiary errors do not provide a basis for habeas corpus relief unless they amount to a deprivation of fundamental fairness. Lesko v. Owens, supra.; Reynolds v. Ellingsworth, 843 F.2d 712 (3d Cir. 1988), cert. denied 109 S.Ct. 403 (1988).

The events regarding the killing of Nicholls, approximately two hours prior to the killing of Miller, portrayed a scenario of bizarre events in which the actors fled from the Nicholls killing in Nicholls' car, secured another weapon, lured police officer Miller into a chase, realized that the police officer knew the petitioner's co-actor who driving the Nicholls vehicle, and then proceeded to shoot and kill Miller. The testimony regarding events immediately

prior to the Miller homicide served to establish a motive for the killing, i.e., obscuring identification in regard to the Nicholls killing, and also to rebut the testimony that the killing of Miller was accidental. (TT. 339-417). As the Pennsylvania Supreme Court concluded:

> Our review of the record leads us to the conclusion that while the possibility of prejudice existed, it was heavily outweighed by the probative value of Rutherford's testimony. The Appellants were advancing the theory that the shooting of Officer Miller was an accident, that Travaglia's finger had slipped from the gun's hammer. Viewing the facts of the Miller incident in isolation, this theory would be hard to refute.
>
> The Commonwealth introduced Rutherford's testimony to show motive and intent...to show that the Appellants were not just out to harass Miller that evening, but rather that they were in a stolen car, with the victim Nicholls' personal belongings and two firearms which could connect them to the prior wrongdoing.

> Taken in this context, the facts elicited from Rutherford are so heavily related to and intertwined with the circumstances of Miller's killing that their evidentiary value greatly outweighs any possible prejudice suffered by the Appellants. Com. v. Travaglia and Lesko, 502 Pa. at 492-493.

Accordingly, this testimony did not deprive the petitioner of fundamental fairness, and does not provide a basis for federal relief.

The next issue which the petitioner raises, issue number eleven, concerns his allegation that evidence secured as a result of a unreasonable search and seizure was introduced at trial. Specifically, this claim refers to the fact that Pittsburgh police officers forced their way into a hotel room occupied by the petitioner and Travaglia in order to execute a warrant for the latter's arrest. As a result of this entry, Lesko argues that the weapon which he possessed

as well as the statement he made within an hour thereafter, should have been suppressed. The Commonwealth counters that the police had probable cause to arrest the petitioner prior to entering his hotel room.

In Stone v. Powell, 428 U.S. 465 (1976), the Court held that where the state has provided a full and fair opportunity to litigate a Fourth Amendment issue, a federal habeas corpus court may not relitigate that same issue. See also: Gilmore v. Marks, 779 F.2d 51 (3d Cir. 1986), cert. denied 479 U.S. 1041 (1987). In the instant case, following an extensive suppression hearing which commenced on September 18, 1980 and continued for several days, the court determined that the evidence seized was not subject to suppression. Because no showing is made here that the petitioner did not have a full and fair opportunity

to litigate this issue, it is not a basis upon which federal relief may be granted.

The next issue which the petitioner raises, issue number twelve, is that his confession was secured in violation of his Miranda rights. The facts do not appear to be in dispute. After Lesko's arrest, he was taken to the police station where he was informed of his Miranda rights and informed that he was being interrogated relative to a minor offense involving a firearms violation and resisting arrest. He thereafter was informed that he was additionally to be questioned about several murders without again being informed of his Miranda rights. It was this interrogation which resulted in his confession which was later introduced into evidence.

A suspect's awareness of all the crimes about which he may be interro-

gated is not relevant to a determination of a valid Miranda waiver. Colorado v. Spring, 479 U.S. 564 (1987). All that is required is knowledge of how a reasonable man would have understood the situation. United States v. Elias, 832 F.2d 24 (3d Cir. 1987). That is, the Constitutional minimum is that an individual in custody be sufficiently aware of his rights, Patterson v. Illinois, 108 S.Ct. 2389 (1988), and that those rights be conveyed to the suspect. Duckworth v. Eagan, 109 S.Ct. 2875 (1989).

In the instant case, the petitioner does not argue that he was unaware of his rights or did not understand them, but rather that he was not again informed of his rights in regard to the homicide investigation. Thus, there is no showing that a valid waiver did not occur.

The next issue which the petitioner raises, i.e., issue number thirteen, is that criminal conspiracy was jointly charged with murder in violation of Pennsylvania procedural law. The Rule applicable at the time of trial, Pa.R. Crim.P. 228(a) prohibited the joining of any count other than voluntary and involuntary manslaughter in a murder information. This prohibition has been subsequently vacated. However, matters of alleged violations of state procedural law are not properly considered in a federal habeas corpus petition, absent a showing that actual prejudice resulted therefrom. Reynolds v. Ellingsworth, 843 F.2d 712 (3d Cir. 1988). No such showing is made here.

The next issue which Lesko raises, issue fourteen, is that the court should have instructed the jury that an accomplice could be guilty of a different

degree of murder than the principal actor. The petitioner does not appear to press this argument too strenuously, and we note that when called upon to review jury instructions, a federal habeas corpus court must review those instructions as an entity rather than in isolated segments. Francis v. Franklin, supra. In this regard we have examined the jury instructions and it would appear that the court properly instructed the jury that the petitioner could only be found guilty as an accomplice and not as a principal and that as an accomplice he could be convicted of the same degree as his principal. (TT. 1275-1277). Thus, reviewing the instructions as a whole, it would appear that the jury was properly instructed, and this issue does not provide a basis for relief.

The next issue which the petitioner raises, issue number fifteen, is that

evidence from a photographic identification was introduced at trial although counsel for the petitioner was not present at the time witness Henderson identified the petitioner from a photospread.

At trial, Henderson testified that on January 3, 1980, while he was driving to work he stopped at a 7-Eleven store for cigarettes (TT. 419-420); that he saw Travaglia and two other individuals in the store (TT. 420); that he had known Travaglia for about twelve years (TT. 421-422); that he agreed to drive Travaglia and the two others to McKeesport where he worked and the ride took about thirty or thirty-five minutes (TT. 427, 429), and that the petitioner was one of the persons who was with Travaglia (TT. 431-432).

Prior to the trial, Henderson had picked the petitioner from a photospread

which was reviewed during the suppression hearing (Suppression transcript pp. 811-827).

In any pretrial identification procedure, the evil to be avoided is the risk of impermissible suggestibility giving rise to a substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972); Government v. Petersen, 553 F.2d 324 (3d Cir. 1977).

In the present case, the witness testified that he had know Travaglia for a long period of time; that Travaglia was with two individuals; that he drive all three of them to McKeesport, and that they were together for about thirty or thirty-five minutes. Based upon this testimony of clear observation creating permanent certainty in the identity of the petitioner, it cannot be said that

the witness' pre-trial identification of the petitioner so tainted his in court identificationn so as to result in the possibility of irreparable misidentification. Accordingly, this issue is without merit.

The next issue which Lesko presents, issue number sixteen, is that he was denied a speedy trial in violation of Rule 1100, Pa.R.Crim.P. as well as the Sixth and Fourteenth Amendments. Violations of Rule 1100, a state procedural rule, will generally not provide a basis for federal relief. Pulley v. Harris, 465 U.S. 37 (1984). This Rule which requires trial within 180 days is not encompassed in the Sixth Amendment speedy trial requirements. Sadler v. Sullivan, 748 F.2d 820 (3d Cir. 1984). Thus, the only valid question presented here is whether or not the petitioner was denied his Sixth Amendment right to

a speedy trial as that right is made applicable to the states through the Fourteenth Amendment. Klopfer v. North Carolina, 386 U.S. 213 (1967).

The facts of this case disclose that the petitioner was arrested on January 3, 1980. A motion for change of venue due to pervasive pretrial publicity was filed and ultimately denied by the court. Accordingly, jury selection commenced and a jury was empaneled on June 2, 1980. Ultimately a mistrial was declared. A jury was then empaneled in Berks County, moved to Westmoreland County, and finally, on January 21, 1981, the trial commenced. Thus, almost exactly one year elapsed between the petitioner's arrest and the commencement of his trial.

In considering an alleged denial of a speedy trial, a court must consider

the length of the delay, the reason for the delay, the assertion of the right to a speedy trial by the defendant and the prejudice if any which inures to the defendant. Barker v. Wingo, 407 U.S. 514 (1972); Burkett v. Cunningham, 826 F.2d 1208 (3d Cir. 1987).

In the instant case, the time lapse between the petitioner's arrest and his trial one year. The reasons for the delay included the granting of a mistrial, the petitioner's requests for a change of venue, and the ultimate necessity of selecting a jury from the opposite end of the state and transferring the jury to western Pennsylvania for the trial. For the most part, it would appear that the delay is attributed by the petitioner to the failure of the court to grand his motion for a change of venue in the first instance. However, there is no showing that the one year delay in

any was prejudiced the petitioner, and thus, this allegation is meritless.

The final issue which must be addressed in this section is issue number nineteen in which the petitioner alleges that the trial court denied him a full and fair hearing when it refused to hold an evidentiary hearing in conjunction with the post-conviction proceedings. Specifically in this regard, the petitioner alleges that he should have been granted a hearing so that he could have introduced testimony from his Indiana County trial attorney that his plea in the Nicholls murder should not have been introduced in the Westmoreland proceedings.

This matter has been more fully discussed above, however, in the context in which it is now raised, it should be observed that the Pennsylvania post-

conviction act provides in 42 Pa.C.S. § 9549 that a hearing is not required where the claim being raised is patently frivolous and without a trace of support either in the record or from other evidence submitted, or where a full hearing was previously held on the issue. This issue had been thoroughly considered both by the Indiana County and the Westmoreland County courts and decided adversely to the petitioner by both those courts and the Pennsylvania Supreme Court in his appeal from the denial of his motion to withdraw the Indiana Plea. Commonwealth v. Lesko, 502 Pa. 511 (1983). For this reason, no further hearing was required.

Additionally, we note that the decision of whether or not to grant a hearing is a procedural one which is not generally subject to habeas corpus relief.

For the reasons set forth above, the issues raised in this section of the petition are without merit.

IV. Conclusion

Because it would appear that all of the issues which the petitioner seeks to raise here are without merit, it is recommended that his petition for a writ of habeas corpus be dismissed. However, because it cannot be said that the issues raised are insubstantial, it is also recommended that a certificate of probable cause to appeal be granted.

Respectfully submitted,

s/ Robert C. Mitchell

ROBERT C. MITCHELL
United States Magistrate

Dated: March 19, 1990

APPENDIX E

Filed: July 27, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3333

JOHN CHARLES LESKO

v.

DAVID S. OWENS, JR., Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; MOREY M. MEYERS, General Counsel of Pennsylvania; and LEROY ZIMMERMAN, Attorney General of the Commonwealth of Pennsylvania

Appellants

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 86-1238)

Argued October 17, 1988

Before: STAPLETON, SCIRICA and COWEN,
Circuit Judges

(Filed July 27, 1989)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

The Commonwealth of Pennsylvania appeals the district court's grant of a writ of habeas corpus. The question presented is whether the introduction of "other crimes" testimony deprived petitioner John Lesko of his Fourteenth Amendment right to a fair trial. We will reverse the judgment of the district court and remand for determination of other claims raised by petitioner.

I.

In the early hours of January 3, 1980, John Lesko, Michael Travaglia and Richard Rutherford were cruising the outskirts of the city of Pittsburgh in a stolen sports car. The trio drove past police officer Leonard Miller, sitting in his patrol car parked at the side of the road outside the Stop-and-Go convenience store. Travaglia, the driver of the car, stated that he "wanted to have some fun with this cop." Travaglia raced past the officer's car beeping his horn, but no

pursuit followed. Travaglia turned the car around, again sped past the patrol car, and again failed to elicit a response. The third time Travaglia sped past, Officer Miller turned on his lights and gave chase. Lesko turned to Rutherford in the back seat and cautioned him to "lay down in the back, because it might turn into a shooting gallery."

A moment later, Officer Miller managed to force the sports car off the side of the road. The officer approached the car on foot. Travaglia rolled down his window, extended his .38 caliber hand gun, and shot Officer Miller twice from close range. Officer Miller returned fire, shattering the passenger side of the window. The three companions sped away. The gunshot wounds Officer Miller received proved fatal.

The trio had begun their escapade together a few hours earlier, in the late evening of January 2, 1980, at a hot dog shop in Pittsburgh. At Travaglia's instruction, Lesko and Rutherford went to the alleyway behind the Edison Hotel, and waited. About ten minutes later a sports car appeared. Travaglia sat in the front seat beside the driver and owner of the car, William Nicholls, a stranger. While Lesko and Rutherford were climbing into the back seat, Travaglia pulled out a .22 caliber hand gun and shot Nicholls in the arm.

After Travaglia took the driver's seat, Lesko told Rutherford to handcuff Nicholls behind the back. As Travaglia drove, Lesko repeatedly punched Nicholls in the face and chest, calling him a queer. Lesko asked Nicholls if he wanted to perform oral sex on him, and taunted him with a knife. Meanwhile, Lesko took Nicholls's belongings, a wallet and an extra set of keys, and told Rutherford to place them in the glove compartment. After Nicholls lost consciousness, Rutherford and Lesko gagged him with a scarf. Travaglia stopped the car near a lake in a wooded

area. Lesko propped Nicholls against a nearby tree, his hands cuffed, his mouth gagged, and his feet bound with a belt. Travaglia and Lesko dragged Nicholls down to the lake and rolled him into the water, where he disappeared.

The three men drove to Travaglia's father's house, where Travaglia knew his father kept a gun. Lesko and Rutherford waited in the car while Travaglia entered the house. Travaglia returned with a .38 caliber handgun, which he handed to Lesko. Upon inspection, Lesko discovered that it contained only bird shot. Travaglia, who had begun driving away, turned the car around and returned to his father's house. Travaglia instructed Rutherford to retrieve the box of bullets lying in the trunk of car parked inside the garage. Lesko stood guard outside. Armed with the gun that had wounded Nicholls, Lesko warned Rutherford that if anything went wrong, Rutherford "had six shots to get out." Rutherford returned with the box of bullets, and the trio drove off. It was these bullets that killed Officer Miller.

After the Miller shooting, Lesko and Travaglia returned to Pittsburgh. At the hot dog shop they met a friend, Keith Montgomery, whom they took to a room in the Edison Hotel and told about the Miller shooting. Travaglia told Montgomery, "I shot a cop." Lesko added, "I wanted to." Travaglia then gave Montgomery the .38 caliber gun used to shoot Officer Miller. When the Pittsburgh police found Montgomery with that same gun later that evening, Montgomery told the police how he had gotten the gun, and that it had been used to shoot a policeman. Lesko and Travaglia were arrested that night. Before surrendering, Lesko pointed a gun at the police.

After receiving *Miranda* warnings, Lesko and Travaglia each gave statements admitting involvement in the killing of Officer Miller. Lesko told the police that he and Travaglia had instigated the car chase

with Officer Miller, "So he'd be chasing us . . . and the car was fast and that -- we'd lose him and could go and knock off the Stop-N-Go." In contrast, Travaglia told the police that he was "playing around with [Officer Miller], trying to aggravate him, and I figured he couldn't chase me across county lines; and since he did, I figured if I pointed the gun at him and told him to throw his gun away, he couldn't stop me and I could keep on going. In the process of pulling the gun on him, the hammer slipped and the shot discharged." Lesko and Travaglia also admitted killing William Nicholls. Additionally, they both implicated themselves in two other shooting murders -- that of Peter Levato and Marlene Sue Newcomer -- committed within the last three days.

In January, 1981, Travaglia and Lesko were tried jointly for the Miller homicide. There had been two changes in venue and a change in venire. Although the trial was held in Westmoreland County, Western Pennsylvania, the jury was selected in Berks County, located in the eastern part of the state. By that time, Travaglia and Lesko had already pled guilty to second degree murder in Indiana County for the Nicholls homicide. For the Miller shooting, both men were charged with first degree murder, Lesko as an accomplice to the principal Travaglia, and for criminal conspiracy to commit murder. They were both convicted of first degree murder and sentenced to death.

At trial, Lesko and Travaglia's sole defense to the charge of first degree murder was that they each lacked the requisite intent to kill. Lesko's counsel argued principally that his client was at most guilty of felony-murder.[1] He argued that in instigating the

1. Pennsylvania law classifies felony murder as second degree murder, and thus not punishable by death. 18 Pa. Cons. Stat. Ann. § 2502(b) (Purdon 1982).

police chase, defendants planned first to divert the officer from the Stop-and-Go store, and later return to rob the establishment. Therefore, Lesko's lawyer urged, the killing was not pre-meditated, but was the unintended result of a botched robbery attempt. Travaglia's lawyer, meanwhile, emphasized that pulling the trigger had been accidental, a result of the hammer of the gun having slipped as Travaglia aimed at the officer.[2] Neither defendant testified at the guilt phase of the trial. However, statements they made in their taped confessions to the police, which the Commonwealth introduced into evidence, were relied on by defense counsel in support of their respective defense theories.

Rutherford was the Commonwealth's principal witness at trial. Rutherford testified about the Miller homicide[3] and the abduction and killing of Nicholls. Both Lesko and Travaglia objected to Rutherford's testimony of the Nicholls murder. Initially, both defendants moved to exclude all reference to the Nicholls murder, contending that its sole purpose was to demonstrate defendants' bad character and propensity to commit similar crimes.

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2. Appellee strenuously maintains in this appeal that whereas Travaglia advanced the theory that the shooting had been accidental, Lesko's own defense to the first degree murder charge was that he was at most guilty of felony murder. Appellee Brief at 15. Assuming that Lesko has accurately portrayed the substance of his defense, this distinction does not alter our analysis. A defense based on the felony-murder scenario, like one based on an "accidental" murder theory, asserts the lack of requisite intent for first degree murder, and as we later discuss, thereby opens the door to the Commonwealth's introduction of evidence to rebut such a claim.

3. Rutherford's additional testimony, including that concerning the acquisition of the gun that killed Officer Miller and certain incriminating comments petitioner made before and after the Miller shooting, are not the subject of the current appeal.

The trial judge permitted Rutherford's testimony to prove motive and state of mind. He stated that he was admitting the evidence because it was probative of the Commonwealth's theory that the officer was not killed as a result of an accident, but was killed because he had approached perpetrators of theft and murder in possession of incriminating evidence, namely, Nicholls' stolen car and wallet, and the gun used to shoot Nicholls in the arm when he was first abducted. Both defendants thereafter moved to limit Rutherford's testimony on the Nicholls' murder to establishing only that the car was stolen, Nicholls was murdered, and they possessed items linking them to these prior crimes when Officer Miller approached the car. The trial judge denied the motion, ruling that the details of the Nicholls murder were relevant to petitioner's state of mind. The court explained that the severity of the Nicholls murder, and its temporal proximity, made it more likely than not that the defendants would attempt to avoid apprehension at any cost, going so far as to murder a police officer.

After determining that the evidence was admissible to prove motive or intent, the trial judge balanced the testimony's probative value against its potential for prejudice, as Pennsylvania law requires. He concluded that the former outweighed the latter, as the testimony reduced the possibility that the killing of Miller was done without intent, or by accident, and could prove essential in establishing the degree of murder. He therefore allowed the jury to hear Rutherford's full account of the Nicholls homicide.

Defense counsel did not request an immediate limiting instruction to the jury. During the jury charge, the judge instructed the jury that they were to use Rutherford's testimony only for the limited purpose of "tending to show [a] motive for the killing [of Officer Miller]. . .and [thereby] . . . rebutting . . .

the allegation that the shooting was accidental." In addition, the trial judge issued the following warning:

> You must not regard this evidence [of the Nicholls murder] as showing that the defendants are persons of bad character or criminal tendencies which [sic] you might be inclined to infer guilt. If you find the defendants or either of them guilty, it must be because you are convinced by the evidence that he or they committed the crimes charged and not because you believe he or they are wicked or have committed other offenses.

As we have stated, the jury found Lesko and Travaglia guilty of murder in the first degree and of criminal conspiracy to commit murder. At the sentencing phase it returned a verdict of death for both defendants.[4] Lesko appealed his conviction and death sentence directly to the Pennsylvania Supreme Court.[5] That court rejected all sixteen issues raised by petitioner and his co-defendant on appeal, including the argument that the death sentences were disproportionate and excessive. The court affirmed the convictions and death sentences. *Commonwealth v. Travaglia*, 502 Pa. 474, 467 A.2d 288 (Pa. 1983); *Commonwealth v. Lesko*, 502 Pa. 511, 467 A.2d 307 (Pa. 1983). Thereafter, the United States Supreme Court denied Lesko's writ of certiorari. *Lesko v. Pennsylvania*, 467 U.S. 1256 (1984), *reh'g denied*, 468 U.S. 1226 (1984). Lesko's petition under Pennsylvania's Post Conviction Hearing Act, 42 Pa.

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4. Under Pennsylvania law, a conviction for first degree murder carries the sanction of either the death penalty or life imprisonment. *See* 42 Pa. Cons. Stat. Ann. § 9711 (Purdon 1982).

5. Death sentences in Pennsylvania are subject to automatic appeal to the Pennsylvania Supreme Court. 42 Pa. Cons. Stat. Ann. §§ 722, 9711 (Purdon 1982).

Cons Stat. Ann. §§ 9541-9551 (Purdon 1982), was denied by the Common Pleas Court and also on appeal. *Commonwealth v. Lesko*, 509 Pa. 67, 501 A.2d 200 (Pa. 1985). In the post-conviction appeal, the Pennsylvania Supreme Court again rejected Lesko's argument that the death sentence was disproportionate. *Id.* at 78-79, 501 A.2d at 206. Lesko's request for rehearing before the Pennsylvania Supreme Court was denied. 509 Pa. 625 (Pa. 1986). Thereafter, the United States Supreme Court denied Lesko's second petition for writ of certiorari. *Pennsylvania v. Lesko*, 479 U.S. 1101 (1987).

While Lesko's petition for certiorari was pending, he filed a petition for writ of habeas corpus in the United States District Court pursuant to 28 U.S.C. § 2254 (1982), contending that errors undermined his trial, conviction, and sentence.[6] Finding that Lesko had exhausted his state court remedies, the district court determined that his due process rights were violated and granted relief. *Lesko v. Jeffes*, 689 F. Supp. 508, 509 (W.D.Pa. 1988).

The district court found that the admission of Rutherford's testimony recounting the Nicholls killing was error of constitutional magnitude. The court ruled that while it would have been permissible to admit evidence that Nicholls had been killed, that his car had been stolen, and that the car and other

6. The district court found that Lesko's habeas corpus petition raised a substantial question as to whether an instruction that the jurors not consider sympathy for the defendant violated the Eighth Amendment. The district court stayed Lesko's execution pending resolution by the United States Supreme Court of *California v. Brown*, 479 U.S. 538 (1987), which concerned the constitutionality of an instruction very similar to the one given the Lesko jury. The Court in *Brown* found that the instruction in question did not violate the Eighth or Fourteenth Amendments. *Id.* at 541. The district court did not, however, rule on the constitutionality of the jury instruction in Lesko's trial.

property belonging to Nicholls was in the possession of the defendants, the probative value of any further details was "non-existent" and the potential for prejudice severe. *Id.* at 515. Noting that no cautionary instruction prefaced the Rutherford testimony, the district court found that the limiting instruction in the judge's jury charge "could not have remedied the prejudice created by the admission of the evidence." *Id.* The district court then subjected the constitutional violation it had found to harmless-error analysis.[7] The district court stated that it could not find beyond a reasonable doubt that the details of the Nicholls' murder played no role in the jury's deliberations, specifically, concerning the degree of guilt. *Id.* at 516. As a final matter, the district court concluded that even assuming *arguendo* the inevitability of a conviction of first degree murder, it could not find beyond a reasonable doubt that the details of the Nicholls murder did not influence the jury during the penalty phase to return a verdict of death. *Id.*

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7. This court has held that in a collateral proceeding, where the reviewing court finds that the admission of evidence violates due process by denying defendant a fair trial, that court must then subject this constitutional error to harmless error review. *See Bisaccia v. Attorney Gen. of New Jersey*, 623 F.2d 307, 312-13 (3d Cir.) (finding denial of due process in admission into evidence of co-conspirators plea, and remanding to district court to determine whether constitutional error was harmless), *cert. denied*, 449 U.S. 1042 (1980). We note a certain overlap in analysis here, i.e., once there is a finding of a denial of a fair trial, it is difficult to envision how such an error could be considered "harmless." We also note that not every court of appeals applies harmless error analysis to this constitutional error. *Compare Bisaccia*, 623 F.2d at 312-13 *and Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988), *with Panzavecchia v. Wainwright*, 658 F.2d 337, 341-42 (5th Cir. 1981), *cert. denied* 57 U.S.L.W. 3654 (1989).

II.

A state prisoner must exhaust available state remedies before filing a petition for habeas corpus in federal court. 28 U.S.C. §§ 2254(b) & (c) (1982); *Ross v. Petsock*, 868 F.2d 639 (3d Cir. 1989). Though not a jurisdictional requirement, the exhaustion rule is more than a mere formality; it serves the interest of comity between the federal and state systems. *Castille v. Peoples*, 109 S.Ct. 1056, 1059 (1989); *Gibson v. Scheidemantel*, 805 F.2d 135 (3d Cir. 1986). To demonstrate compliance with the exhaustion requirement, a habeas applicant must show that the claim included in the federal petition was fairly presented to the state courts. *Castille v. Peoples*, 109 S.Ct. at 1060; *Picard v. Connor*, 404 U.S. 270, 275 (1971). This requires that the claim brought in federal court be the substantial equivalent of that presented to the state courts. *Id.* at 278. Both the legal theory and the facts supporting a federal claim must have been submitted to the state courts. *Ross v. Petsock*, 868 F.2d at 641; *Gibson v. Scheidemantel*, 805 F.2d at 139.

We conclude that petitioner has exhausted his state court remedies. On direct appeal to the Supreme Court of Pennsylvania, petitioner argued that the trial court had erred in admitting Rutherford's testimony because its probative value was outweighed by its prejudicial effect. The Pennsylvania Supreme Court, after finding that the details of the Miller homicide, as developed by Rutherford's testimony, were relevant to prove defendants' motive and state of mind, held that "while the possibility of prejudice existed, it was heavily outweighed by the probative value of Rutherford's testimony." *Travaglia*, 502 Pa. at 492, 467 A.2d at 297. Lesko's federal petition for writ of habeas corpus alleges that the probative value of Rutherford's testimony was outweighed by its

prejudicial effect, and therefore its admission was erroneous. The legal theory (the probative value of evidence was outweighed by its prejudicial effect) and the facts (the substance of Rutherford's testimony) on which Lesko's federal claim rests, had been submitted to the state courts. Thus, the issue decided by the Pennsylvania Supreme Court was the substantial equivalent of Lesko's fourteenth amendment claim. *See McMahon v. Fulcomer*, 821 F.2d 934, 941 (3d Cir. 1987)(petitioner's claim that trial judge improperly required him to act as his own counsel was substantial equivalent of his sixth amendment claim).

III.

Our review of the district court decision to grant the writ is plenary. We derive this standard from the function of a reviewing court in a habeas corpus proceeding. Federal courts "do not sit to retry state cases *de novo* but, rather, to review for violations of federal constitutional standards." *Milton v. Wainwright*, 407 U.S. 371, 377 (1972); *see also United States ex rel. Abdus-Sabur v. Cuyler*, 653 F.2d 828, 833-34 (3d Cir.) (in banc), *cert. denied*, 454 U.S. 1088 (1981); *Bisaccia v. Attorney Gen. of New Jersey*, 623 F.2d 307, 312 (3d Cir.), *cert. denied*, 449 U.S. 1042 (1980). Accordingly, petitioner claims that the admission of inflammatory evidence violated his fourteenth amendment right to a fair trial. The district court found such a violation. Thus, in examining the district court opinion, we evaluate whether the district court correctly found that admission of evidence amounted to error of constitutional proportion. Whether an error reaches the magnitude of a constitutional violation is an issue of law, subject to plenary review. *See Sullivan v. Cuyler*, 723 F.2d 1077, 1082 (3d Cir. 1983).

In arguing that the district court's decision should receive the "clearly erroneous" standard of review, petitioner misunderstands our holdings in *Sullivan*, 723 F.2d 1077, and *Krasnov v. Dinan*, 465 F.2d 1298 (3d Cir. 1972). Although in *Sullivan* we subjected a portion of a district court decision in a habeas corpus proceeding to the "clearly erroneous" standard of review, we did so because the district court had ordered an evidentiary hearing, and made subsequent factual findings as to whether there was an actual conflict of interest in representation of a criminal defendant. *Sullivan*, 723 F.2d at 1082, 1083. The standard of review enunciated in *Krasnov*, meanwhile, is completely inapposite: *Krasnov* concerns a district court's finding of facts as to the existence of diversity jurisdiction.[8]

IV.

The Commonwealth initially argues that in finding that the probative value of Rutherford's testimony was "non-existent," the district court

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8. At oral argument it was also suggested that the "abuse of discretion" standard -- the standard accorded a district court's balancing of prejudice and relevance pursuant to Federal Rule of Evidence 403 -- might be applicable here. It is not. This deferential standard is generally accorded the trial judge who has a unique vantage point to assess possible prejudice. *See United States v. Guerrero*, 803 F.2d 783, 785 (3d Cir. 1986)(Rule 403 requires considerable deference on part of reviewing court to the "hands-on" judgment of trial judge); *United States v. Long*, 574 F.2d 761, 767 (3d Cir.)(trial judge, not appellate judge, in best position to assess the extent of prejudice caused a party by a piece of evidence, because appellate judge works with a "cold record," whereas trial judge is "there in the courtroom"), *cert. denied*, 439 U.S. 985 (1978). In a habeas corpus proceeding, however, where the district court functions not as a trial court, but as an appellate court that draws legal conclusions from a cold record, the deference we accord the district court's "evidentiary rulings" is unwarranted.

"exceeded its authority in a habeas proceeding." From the well-established principle that states have broad discretion to develop rules of evidence they will apply in their criminal proceedings, the Commonwealth contends that because the Pennsylvania Supreme Court has already held Rutherford's testimony relevant to prove motive and intent, the district court was "bound to accept the determination of relevance made under state laws and apply the due process balance to determine if that relevance was outweighed by the prejudicial impact of the statement."

We do not believe that the district court exceeded the scope of its authority in a habeas corpus proceeding. Clearly, at the heart of petitioner's complaint is a challenge to a state court evidentiary ruling. Yet this court, along with other federal courts of appeals, has recognized that the erroneous admission of evidence that is relevant, but excessively inflammatory, might rise to the level of a constitutional violation. *See, e.g., United States ex rel. Mertz v. New Jersey*, 423 F.2d 537, 539-40 (3d Cir. 1970); *Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir. 1988), *cert. denied* 57 U.S.L.W. 3654 (1989); *Walker v. Engle*, 703 F.2d 959, 968 (6th Cir.), *cert. denied sub nom. Marshall v. Walker*, 464 U.S. 951 (1983); *Osbourne v. Wainwright*, 720 F.2d at 1237, 1239 (11th Cir. 1983)(per curiam); *Panzavecchia v. Wainwright*, 658 F.2d 337, 341-42 (5th Cir. 1981). Accordingly, a reviewing court must examine the relative probative and prejudicial value of evidence to determine whether its admission violated defendant's right to a fair trial. In this case, the district court explained that it was reviewing for constitutional error, not errors in state law, and thus examined the testimony's probative worth to assess the constitutional implications of the state court's ruling. *See* 689 F. Supp. at 513.

We point out, however, that just as "[n]ot every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice,'" *United States ex rel. Perry v. Mulligan*, 544 F.2d 674 (3d Cir. 1976)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)), *cert. denied*, 430 U.S. 972 (1977), not every error in balancing probative value against prejudicial effect "amount[s] to error which rises to constitutional dimensions." *See United States ex rel. Mertz v. New Jersey*, 423 F.2d at 539-40. In *Bisaccia v. Attorney Gen. of New Jersey*, 623 F.2d 307 (3d Cir.), *cert. denied* 449 U.S. 1042 (1980), we identified at what point such an error in balancing might be cognizable in a habeas proceeding

> When it must be said that the probative value of such evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, then use of such evidence by a state may rise to the posture of fundamental fairness and due process of law.

623 F.2d at 313 (quoting *United States ex rel. Bibbs v. Twomey*, 506 F.2d 1220, 1223 (7th Cir. 1974)). *Accord Osbourne v. Wainwright*, 720 F.2d 1237, 1239 (11th Cir. 1983)(per curiam)(error in balancing must be of "such magnitude" as to deny fundamental fairness); *United States ex rel. Palmer v. DeRobertis*, 738 F.2d 168, 171 (7th Cir.)(when probative value of evidence is "greatly outweighed" by the prejudice to the accused, then use of such evidence may "rise to the posture of the denial of fundamental due process"); *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2722 (1988)(Scalia, J., dissenting)(addressing issue not reached by majority opinion). Therefore, only if the inflammatory nature of Rutherford's testimony so

plainly exceeds its evidentiary worth, will we find that a constitutional error has been made.

Additionally, we note that in evaluating the decisions of our own federal trial courts (over which we have supervisory power and therefore are obligated to correct erroneous interpretations of the Federal Rules of Evidence), we have cautioned that "if judicial self-restraint is ever desirable, it is when a Rule 403 analysis [balancing probative and prejudicial effect] of a trial court is reviewed by an appellate tribunal." *United States v. Scarfo*, 850 F.2d 1015, 1019 (3d Cir.), *cert. denied* 109 S.Ct. 263 (1988). The reason for this deference is apparent:

> Like any balancing test, the . . . standard is inexact, requiring sensitivity on the part of the trial court to the subtleties of the particular situation, and considerable deference to the hands-on judgment of the trial judge.

United States v. Guerrero, 803 F.2d 783, 785 (3d Cir. 1986).

In sum, our scope of review in this case is limited. We inquire whether the evidence's probative value is so conspicuously outweighed by its inflammatory content, so as to violate a defendant's constitutional right to a fair trial. Moreover, we will accord the state trial judge the deference we accord our federal trial judges, who are in a unique position to assess the relative probative value and inflammatory effect of proffered testimony.

V.

We now turn to petitioner's claims of unfair prejudice. For clarity, we note what is not at issue here. In his habeas corpus petition, Lesko claims that any mention of the Nicholls murder was inadmissible, as irrelevant and unduly prejudicial. The district court, however, rejected this argument, ruling that,

> The killing of Officer Miller . . . could be seen to be consistent with an attempt to avoid apprehension. Had the trial court limited the testimony of Rutherford, as requested by petitioner's counsel, excluding the details of the torture-murder of Nichols [sic], the Court would be unwilling to conclude that a fair trial had been denied.

689 F. Supp. at 515. Thus, the issue in this appeal is whether Rutherford's account of the Nicholls incident was relevant to either motive or intent, and whether its prejudicial effect so conspicuously exceeds its evidentiary worth as to violate the federal constitution.

Under Pennsylvania law, while evidence of other unrelated criminal conduct of the accused is generally inadmissible to prove the commission of the crime, such evidence is admissible where relevant to prove: (1) motive, (2) intent, (3) a common scheme or plan involving the commission of two or more crimes so closely related that proof of one tends to prove the other, (4) the identity of the perpetrator, or (5) the absence of mistake or accident. *Commonwealth v. Styles*, 494 Pa. 524, 525-26, 431 A.2d 978, 980 (Pa. 1981). In addition, "other crimes" evidence, though relevant, must be excluded if the probative value is outweighed by the danger that the facts offered may unduly arouse the jury's prejudice or hostility. *Commonwealth v. Travaglia*, 502 Pa. at 492, 467 A.2d at 297. Applying this law to Rutherford's testimony, the Pennsylvania Supreme Court held that "the details of the incidents which occurred just a short time prior to Officer Miller's shooting were developed to show that the Appellants . . . were in a stolen car, with the victim Nicholls' personal belongings and two firearms which could connect them to the prior wrongdoing," and therefore

introduced to show motive and intent. *Id.* at 493, 467 A.2d at 297. In addition, the court held that their probative value outweighed their prejudicial effect. *Id.* at 492, 467 A.2d at 297.

Each court that has examined the facts of this case, including the district court, has held that evidence of the occurrence of the Nicholls killing was relevant to proving intent. As in all homicide cases, the jury's perception of state of mind of Lesko and Travaglia at the time of killing determined the degree of murder. To establish Lesko's accomplice culpability for first degree murder, the Commonwealth was required to prove that petitioner, with the intent of promoting or facilitating the commission of first degree murder, aided, agreed, or attempted to aid Travaglia in planning or committing the murder of Officer Miller.[9] In addition, the defenses raised by Lesko (felony murder rather than premeditated homicide) and Travaglia (accidental rather than intentional shooting), compelled the Commonwealth to introduce evidence demonstrating that Lesko and Travaglia intended to kill Officer Miller, and that they had motives to do so. It is generally recognized that evidence of motive may be probative of specific intent.

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9. Pennsylvania law defining accomplice liability provides in pertinent part:

> • • •
>
> (c) Accomplice defined. – A person is an accomplice of another person in the commission of an offense if:
>
> (1) with the intent of promoting or facilitating the commission of the offense, he:
>
> • • •
>
> (ii) aids or agrees or attempts to aid such other person in planning or committing it . . . .

18 Pa. Cons. Stat. Ann. § 306 (Purdon 1983).

particularly for crimes that are allegedly motivated by the desire to interfere with law enforcement. *See* E. Cleary, *McCormick on Evidence* § 190 at 562-63 & n.35 (3d ed. 1984). Thus, one means of proving Lesko's intent to promote or facilitate Travaglia's act of murder, is to establish that Lesko, like Travaglia, had a motive to kill. In sum, proof of Lesko's state of mind, and, consequently, any motive he might have had to kill Office Miller, were genuinely at issue in the case.

We find that just as the occurrence of the Nicholls murder was relevant, the Nicholls incident as a whole was relevant to a central issue in the case -- the motive and state of mind of Lesko and Travaglia. As we have discussed, the Commonwealth sought to demonstrate that both the trigger-man Travaglia and passenger Lesko, if approached by a law enforcement officer, intended to go to any length to hide the facts of their prior crime and, moreover, had motive to take such a drastic approach. Where the motive of a killing is interference with law enforcement -- in this case the most extreme example, killing a policeman -- the severity and circumstances of the crime being hidden is highly probative. If, for example, the Nicholls killing had been accidental, or in self-defense, Lesko arguably would have been less likely to take such extreme measures to avoid apprehension. On the other hand, apprehension and prosecution for a murder as deliberate as the Nicholls homicide, could have dire consequences in the event of a conviction. Furthermore, Rutherford's account of the events leading to the Miller homicide conveys the temporal proximity of the Nicholls homicide, which reinforces the Commonwealth's theory that the Nicholls murder figured prominently in defendants' minds as Officer Miller approached the stolen sports car.[10]

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10. We note that the trial court refused to admit testimony that the .22 caliber gun, seen on the person of Lesko, could also

As we have already suggested, Rutherford's testimony is also probative to rebut Lesko's defense regarding his state of mind during the Miller incident. First, by stressing that the incident was best characterized as "felony murder," Lesko was essentially urging the jury to believe that while he admittedly agreed to instigate the car chase, he had no knowledge from the surrounding circumstances that the chase would culminate in murder, and played no role in promoting such an outcome. During his summation, Lesko's counsel argued that Lesko's remark that "this place might turn into a shooting gallery" was "the statement of any would-be robber in a car driven by a man with a gun. . . . " In other words, Lesko was asserting that he had participated in a crime -- but that crime was attempted burglary or robbery, not first degree murder. To view the Miller incident in isolation would render Lesko's claim plausible. On the other hand, Lesko's assertion that in the moments before the Miller killing, he had promoted only the commission of robbery and burglary (but not murder) appears less credible if one learns that just a few hours before, both he and Travaglia had deliberately and fully participated in the Nicholls homicide. In this context, this evidence was probative to show that in participating in the instigation of the police chase and through his talk about a "shooting gallery," Lesko shared Travaglia's intent to open fire and encouraged Travaglia to do so.[11]

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tle defendants to the Newcomer and Levato murders, which were committed a few days earlier. In that instance, the trial court found that the "prejudice outweighs the probative value."

11. We note that under Pennsylvania law, the least degree of concert or collusion is sufficient to sustain a finding of responsibility as an accomplice. *Commonwealth v. Caccioletti*, 493 Pa. 103, 109, 425 A.2d 387, 390 (1981).

In a second and related aspect of his defense, Lesko portrayed himself as a passive observer of Travaglia's allegedly unilateral decision to open fire on Officer Miller. Lesko's lawyer argued in summation that "John Lesko was sitting in the car as Ricky Rutherford was . . . . He was a passenger. He didn't shoot Officer Miller. Ricky Rutherford didn't shoot Officer Miller. Mike Travaglia shot Officer Miller." Similarly, during summation, Lesko's lawyer read from Lesko's statement to the police, in which Lesko explained that, "[the officer] put on his lights and started chasing us. The police officer went down, and that there. I heard six shots come through the window beside me, and when I looked up, it was all busted out. . . ." Thus, the *in limine* motion offered by defendants was sparse and, from an evidentiary point of view, sterile. The motion proposed to stipulate only that Nicholls had been killed and that Lesko possessed items tying him to the crime, including a gu.., wallet, and a stolen car. The jury would not have learned that Lesko had willingly and fully participated in all of the evening's activities, which included a prior homicide.

In summary, the central issue in the Commonwealth's case against Lesko was whether he deliberately supported Travaglia in a premeditated killing of Miller or whether he was guilty only of participating in an abortive attempt at robbery. Members of the jury could not have determined what was in Lesko's mind based solely on the events immediately preceding Miller's death. The jury could only have fairly evaluated the Commonwealth's theory regarding Lesko's state of mind by hearing evidence tending to show that Travaglia and Lesko had jointly embarked that evening on a crime spree, that they had already committed a homicide likely to command the death penalty, and that they had in their

possession powerful evidence of their guilt of that homicide. Moreover, to be in a position to evaluate Lesko's state of mind during the critical moments during the Miller encounter, the jury needed to hear sufficient details about these matters to be able to appreciate the nature of the evening's joint undertaking, the relationship and mood of the participants, and the extent of the criminal exposure of those participants in the event of their apprehension by Miller. If one views Rutherford's testimony as furnishing the overall context in which Travaglia and Lesko acted in the few minutes preceding Miller's death, then this testimony plays a critical role in enabling the jury to evaluate the Commonwealth's proposed scenario as compared with the defendants' alternative explanation of events.

Having determined that the evidence was probative as to state of mind, we now consider its potential to create unfair prejudice. Evidence may be "unfairly" prejudicial if it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case." *United States v. Guerrero*, 803 F.2d at 785. The acts committed by petitioner are shocking and therefore capable of eliciting an emotional response from the jury. Nevertheless, given the probative value of Rutherford's testimony as to Lesko's motive to kill Officer Miller, and to refute his self-portrayal as a passive observer, we do not find that the prejudicial impact outweighs its probative value -- no less that it does so in a manner so conspicuously as to rise to the level of a constitutional violation. In reaching this conclusion, we are mindful not only that prejudice must be great enough to reach the magnitude of a constitutional violation, but also that the trial judge, rather than the

reviewing court, is in the best position to assess the impact of that prejudice.

In arguing for the exclusion of the testimony adjudged relevant by the trial court, petitioner cites various cases in support of the proposition that "due process can be denied where the manner of introduction of relevant evidence is prejudicial." We find these cases to be inapposite. In *United States ex rel. Bibbs v. Twomey*, 506 F.2d 1220 (7th Cir. 1974), a case on which Lesko relies, the prosecutor introduced into evidence four prior crimes committed by defendant to impeach the credibility of the defendant on cross-examination. This amounted to ten pages of testimony that had no bearing on any element of the crime with which the accused was charged. Understandably, the reviewing court found that the prosecutor's recitation of the four prior crimes constituted "undue repetition, excessive concentration, and over-dramatization." Similarly, in *United States v. Dow*, 457 F.2d 246 (7th Cir. 1972), also relied on by petitioner, cross examination of defendant focused excessively on his prior criminal record; the prosecutor slowly elicited the details of each of the defendants prior convictions, which included prison escape, auto theft, robbery and assault, and which bore only on the issue of defendant's credibility. In Lesko's case, we find no such excessive concentration or embellishment. Rutherford merely narrated the series of events; the record reveals no repetition, embellishment, or dramatics. Likewise, the prosecutor in summation referred only briefly to the Nicholls murder, without mentioning a single detail. Further, there was no mention of the details of the prior murder during the penalty phase of trial. Therefore, because we do not find prejudicial the "manner" of introduction of the Nicholls murder, nor do we see prosecutorial

misconduct, we regard the cases Lesko cites as inapposite.

Finally, any potential for unfair prejudice by the admission of this evidence was limited by the clear instructions the jury received in the final charge. When testimony is offered for a specific, proper purpose, limiting instructions have the ability to forestall its possible prejudicial effects. As the Supreme Court has stated, "limiting instructions on this subject are no more difficult to comprehend or apply than those upon various other subjects." *Spencer v. Texas*, 385 U.S. 544, 562-63 (1967)(citation omitted). The instruction given here was clear and directly on point. The jury was told that they were to convict defendants only "because you are convinced by the evidence that he or they committed the crimes charged and not because you believe he or they are wicked or committed other offenses."

It is not argued, moreover, that the jury instructions given here were deficient. Rather, the district court held that they were ineffective because they were given at the conclusion of the trial, about a week after Rutherford's testimony. This omission, however, is attributable to the defense counsel's failure to request an immediate cautionary instruction. Consequently, were Lesko himself to complain of the lack of a cautionary instruction, his burden of proof would be heavy. *See Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)(heavy burden in collateral attack to demonstrate that jury instruction, which was never requested, "so fatally infected the entire trial that the resulting conviction violates dues process")(quoting *Cupp v. McNaughton*, 414 U.S. 141, 147 (1973)). Although it would have been desirable for the trial judge to have immediately given a cautionary instruction regarding the purpose for which this evidence was admitted, we do not believe

that the failure to do so -- by itself -- so fatally infected the trial as to deny Lesko due process of law.

VI.

We now turn to the impact of Rutherford's testimony on the jury's verdict on the imposition of sentence. At the sentencing phase, the Commonwealth sought to establish two "aggravating circumstances" under the Pennsylvania sentencing code: first, the victim was a police officer, 42 Pa. Cons. Stat. Ann. § 9711(d)(1), and second, Lesko had been convicted of a crime for which death or life imprisonment was imposable, 42 Pa. Con. Stat. Ann. § 9711(d)(10).[12] As proof of the latter aggravating circumstance, the jury was informed at the sentencing phase that Lesko had pled guilty to second degree murder, that pleading guilty constituted a "conviction" under the Pennsylvania statute,[13] and that he automatically received a life sentence for this

12. Former § 9711, in force when Lesko was tried, provides in pertinent part:

> (d) Aggravating circumstances. -- Aggravating circumstances shall be limited to the following:
>
> (1) The victim was a . . . peace officer. . . killed in the performance of his duties.
>
> • • •
>
> (10) The defendant had been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable. . . .

42 Pa. Cons. Stat. Ann. § 9711. Section 9711 was amended in 1986. *See* Act of July 7, 1986, P.L. No. 400, No. 87, § 1.

13. On direct appeal of Lesko's conviction and sentence, the Pennsylvania Supreme Court ruled that the legislature intended the term "conviction" to include a guilty plea. *Commonwealth v. Travaglia*, 502 Pa. at 496-97, 467 A.2d at 298-99.

conviction. The Commonwealth did not mention the details of the Nicholls murder and the trial judge did not instruct the jury to consider them. Nevertheless, Lesko claims that the sentencing phase of his trial was constitutionally defective because it was conducted with the jury knowing not merely that a prior murder had occurred, but knowing additionally the circumstances surrounding the Nicholls homicide. Stated otherwise, Lesko argues that the sentencing verdict, although ostensibly resting on the "aggravating circumstances" enumerated in the statute, was tainted with evidence not properly before the jury. This argument does not withstand scrutiny. As both a statutory and constitutional matter, the other offenses perpetrated in conjunction with the Nicholls murder were properly before the jury during the penalty phase.

Pennsylvania's sentencing scheme limits the jury's consideration of "aggravating circumstances" to those specified by statute. 42 Pa. Cons. Stat. Ann. § 9711(a)(2). Nevertheless, we believe that under § 9711(d)(10), the jury properly considered the other offenses perpetrated in conjunction with the Nicholls homicide. In *Commonwealth v. Beasley*, 505 Pa. 279, 479 A.2d 460 (1984), the Pennsylvania Supreme Court upheld the imposition of the death penalty where the jury had learned as a statutory "aggravating circumstance" under § 9711(d)(11) not only that the defendant had been convicted of a prior crime for which a death sentence was imposable, but also that the victim in the previous homicide was a police officer. In so holding, the court interpreted the term "convictions" in § 9711(d)(11) to permit consideration of "the essential and necessary facts pertaining to the conviction, *including the circumstances of the crimes* and the sentences imposed." 505 Pa. at 289, 479 A.2d

at 465 (emphasis added).[14] The *Beasley* court explained its decision as follows:

> In this Commonwealth, sentencing has long been regarded as having at its core a function of character analysis, *see Commonwealth v. Bell*, [417 Pa. 291, 208 A.2d 465 (1965)], and the central idea of the present sentencing statute is to allow a jury to take into account such relevant information, bearing upon a defendant's character and record, as is applicable to the task of considering the enumerated aggravating circumstances. Consideration of prior "convictions" was not intended to be a meaningless and abstract ritual, but rather a process through which a jury would gain considerable insight into a defendant's character. The nature of an offense, as ascertained through examination of the circumstances concomitant to its commission, has much bearing upon the character of a defendant, and, indeed, without reference to those facts and circumstances, consideration of "convictions" would be a hollow process, yielding far less information about a defendant's character than is relevant.

Id. [15] Thus, the bad acts committed during the

14. We do not find it significant that the *Beasley* decision interpreted § 9711(d)(11), rather than § 9711(10) which is at issue in our case, as the *Beasley* rationale applies equally to both sections. Additionally, in determining that the term "conviction" in § 9711(d)(11) did not require that a defendant actually have been sentenced, the *Beasley* court expressly relied on its prior interpretation of the term "conviction" in § 9711(d)10), thereby implying that the term "conviction" as it appears in these sections should be read consistently.

15. We note that Pennsylvania's view that prior convictions play an integral role in character analysis is shared by a majority of states. A multi-state survey reveals that most post-*Gregg* state

Nicholls murder, as circumstances of that murder, were properly considered under § 9711(d)(10).

This conclusion is constitutionally sound. In *Zant v. Stephens*, 462 U.S. 862 (1983), the Supreme Court discussed the aggravating factors properly considered by a jury in the sentencing phase of a capital case:

> Our cases indicate . . . that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.

Id. at 878-79 (1983)(emphasis in original). This passage answers Lesko's claim that the jury's consideration of the circumstances of the Nicholls murder invalidates his sentencing proceeding.

As a general matter, the *Zant* Court clarified that to protect adequately against the arbitrary imposition of the death penalty, *see id.* at 874-76, the decision maker must engage in an individualized character analysis of each defendant.[16] In other words, unlike in

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sentencing statutes concentrate on the defendant's character and behavioral propensities, rather than on the circumstances of the crime for which he is being sentenced. *See* 65 A.L.R.4th § 2[a] at 851-52 (1988). These statutes are thought to address the likelihood that defendant will in the future inflict further harm on society, *see id.*, a consideration that the Supreme Court has validated as relevant to the sentencing determination, *see California v. Ramos*, 463 U.S. 992, 1003 (1983).

16. In *Gregg v Georgia*, 428 U.S. 153 (1976)(plurality opinion), the plurality opined that an informed jury was a prerequisite to a

the guilt phase of trial where fairness requires that "character evidence," though relevant to the proceeding, be excluded to ensure that the jury does not punish the accused regardless of the sufficiency of the evidence in the case, *see* E. Cleary, *McCormick on Evidence* at § 190 at 557 (3d ed. 1984); *United States v. Guerrero*, 803 F.2d at 785, in the penalty phase of trial, the jury necessarily focuses its attention on the character of the defendant. Applying this reasoning, we find nothing irrational or unconstitutional in the judgment of the *Beasley* court that knowledge of the circumstances of the prior crime, rather than merely of the conviction alone, most directly advances the goal of character assessment. As part and parcel of Lesko's background and prior record, the events leading up to the Nicholls killing properly informed the jury's individualized assessment of Lesko's character and concomitant decision on the appropriateness of the imposition of penalty.

Furthermore, the *Zant* decision affirmed the settled rule that the circumstances of the crime for which defendant was being sentenced were properly before the jury during the sentencing stage. In Lesko's direct appeal, the Supreme Court of Pennsylvania held that the details of the Nicholls murder were properly before the jury at the sentencing phase:

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fair sentencing procedure. The plurality wrote,

> If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about the defendant and the crime he committed in order to be able to impose a rational sentence, it is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

Id. at 190.

> There may be circumstances where evidence, deemed admissible at trial because its relevance to the determination of guilt outweighs its possible prejudice, should nevertheless be excluded because it is so inflammatory that its relevance to determination of sentence would be outweighed by its potential for prejudice. . . . In most cases, however, the decision that the evidence is admissible for purposes of the guilt phase renders it . . . admissible for the penalty phase as part of the "circumstances" to be considered by the jury.

Travaglia, 502 Pa. at 493-94, 467 A.2d at 298. We agree. As we have explained earlier, the Nicholls incident was not a "prior crime" unrelated to the crime for which he was being sentenced. Rather, the entire Nicholls incident furnished the context and motive for the Miller homicide. Accordingly, as the jury determined the penalty for the Miller homicide, it was relevant that the murder occurred in the course of a crime spree including, among other crimes, another cruel killing.

The relevance of the Nicholls incident to Lesko's sentencing proceeding comes into sharper focus when compared with factors the *Zant* Court characterized as "constitutionally impermissible or totally irrelevant to the sentencing process," *id.* at 885. As examples of such impermissible factors, the Court listed "the race, religion, or political affiliation of the defendant." *Id.* Subsequently, in *Booth v. Maryland*, 482 U.S. 496 (1987), the Court found an example of considerations totally irrelevant to the sentencing proceeding, introduced in the form of a "Victim Impact Statement" (VIS), which focused on the personal characteristics of the victim and the severe emotional impact of the crime on the victim's family. Invoking the lesson of *Zant v. Stephens* that the jury's sentencing decision is properly based on the "character of the individual

and the circumstances of the crime," 482 U.S. at 502, the *Booth* Court characterized VIS evidence as irrelevant, highly inflammatory, and capable of diverting the jury's attention away from "the defendant's background and record, and circumstances of the crime," *id.* at 505-08. *See also South Carolina v. Gathers*, 57 U.S.L.W. 4629, 4630 (June 12, 1989)(Eighth amendment violated where prosecutor's closing argument at sentencing phase included lengthy reading from religious tract victim was carrying and mention of victim's voter registration card, as such extensive focus on character of victim does not "relate directly" to circumstances of the crime). In this case, there is no claim that the consideration of the Nicholls incident introduced into the sentencing proceeding constitutionally improper criteria such as race or religion. Furthermore, unlike the VIS which distracted the jury's concentration from the relevant evidence concerning the defendant himself, the evidence at issue here focuses directly on the defendant's background and character, and was therefore highly relevant to the sentencing process.

Although we believe that the Nicholls incident would have been properly introduced under Pennsylvania's sentencing statute, we note that under the *Zant* analysis, the constitutionality of the jury's consideration of aggravating factors is an issue independent of state law. The *Zant* Court rejected the notion that a death sentence could be tainted by evidence other than that which forms the statutory justification for imposing the death sentence, noting that "the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death," *id.* at 874-75. Later in the opinion, the Court again

stated that while a defendants's prior history of noncapital cases could not by itself provide sufficient justification for imposing the death sentence, "[n]othing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making its sentencing determination." *Id.* at 888. Thereafter, in *Barclay v. Florida*, 463 U.S. 939 (1983), the Court held that although the state sentencing statute forbid the jury to consider defendant's prior criminal record, this violation of state law did not violate the federal constitution. *Id.* at 956. Therefore, in assessing the severity of the aggravating circumstances, the Lesko jury could constitutionally consider the other offenses perpetrated during the Nicholls homicide, regardless of the state statutory scheme.

In addition, the limits on the jury's consideration of nonstatutory aggravating factors suggested by Supreme Court dicta prove inapplicable to this case. There is no question that the Lesko jury found at least one statutory aggravating circumstance. *See Barclay v. Florida*, 463 U.S. at 966-67 (Stevens, J., concurring)("a death sentence may not rest *solely* on nonstatutory aggravating factor")(citing *Zant v. Stephens*, 462 U.S. at 876-78). In returning its sentencing verdict, the jury expressly informed the trial court that it had found two aggravating factors under the Pennsylvania sentencing statute: first, the victim was a police officer, 42 Pa. Cons. Stat. Ann. § 9711(d)(1), and second, Lesko had been convicted of a crime for which death or life imprisonment was imposable, 42 Pa. Con. Stat. Ann. § 9711(d)(10). Thus, the sentencing statute in this case indisputably served its constitutional function of circumscribing the class of persons eligible for the death penalty, *see Zant v. Stephens*, 462 U.S. at 878-79. Additionally,

some language in the *Zant* opinion arguably suggests that undue emphasis on nonstatutory aggravating circumstances might form the basis of a valid constitutional attack. *See id.* at 888-89. As we have already noted, during the guilt phase of trial there was no embellishment or histrionics on the Nicholls incident. Similarly, neither the Commonwealth nor the trial judge mentioned the details of the Nicholls murder at the penalty phase. Consequently, Lesko cannot claim that there was particular emphasis placed on these prior offenses and surrounding circumstances.

As a final matter, we address the dissent's suggestion that Supreme Court dicta in the plurality opinion in *Gregg v. Georgia*, 428 U.S. 153 (1976), undermines our analysis. Typescript at 13-14. Beginning with the proposition that a jury is more likely to impose a sentence of death than a trial judge, the dissent argues that the *Gregg* dicta supports the conclusion that the jury could not during the sentencing phase have ignored the evidence relevant to the guilt phase, and therefore this evidence was improperly admitted. We disagree. The *Gregg* plurality, after recognizing that "much of the information that is relevant to the sentencing phase may *have no relevance to the question of guilt*, or may even be extremely prejudicial to a fair determination of that question [of guilt]," declared that a bifurcated trial is the "best answer" to this "scarcely insurmountable" problem. 428 U.S. at 190 (emphasis added). We first note that because the sentencing procedure follows the determination of guilt, a bifurcated trial could not solve this problem of spillover. Thus, total exclusion from trial presents the only answer. In Lesko's direct appeal, the Supreme Court of Pennsylvania, while recognizing the need for balancing, stated that in most circumstances,

> [w]here facts are relevant for a proper purpose at trial, defendants may not be heard to complain about the horrid character of such facts. To find otherwise would give rise to the perverse result that a capital defendant would benefit more, the more horrid the background circumstances were.

Travaglia, 502 Pa. at 493-94, 467 A.2d at 298. More importantly, the *Gregg* dicta rests on the principle that the evidence to be admitted at the sentencing phase was completely irrelevant on the issue of guilt. The converse of this problem appeared in *South Carolina v. Gathers*, 57 U.S.L.W. 4629, where in the penalty phase, the prosecutor impermissibly focused on items belonging to the victim, which were properly admitted to the guilt phase, but irrelevant to an individualized determination of defendant's personal culpability. *Id.* at 4630. In contrast, we have found that the details of the Nicholls murder were relevant to both guilt and sentencing. Thus, we hold that their probative value, evaluated from both phases of the trial, compared with their prejudicial impact, permitted the jury to consider them at the penalty phase.

VI.

The admission into evidence of Rutherford's account of the Nicholls murder did not violate the due process clause of the Fourteenth Amendment. The testimony was probative as to petitioner's motive and intent; thus, absent some sort of prosecutorial misconduct such as excessive reference or embellishment, its potential for unfair prejudice did not so conspicuously outweigh the probative value, that its mere admission denied petitioner a fair trial.

We will reverse the decision of the district court and remand for determination of the other claims petitioner raised in his petition for writ of habeas corpus.

COWEN, *Circuit Judge*, dissenting.

In light of the substantial deprivation of fundamental due process raised in the record before me, I respectfully dissent.

I.

The question presented on this appeal is whether the prosecutor had license to present every lurid detail of the murder of William Nicholls during Lesko's trial for the murder of Police Officer Miller. The majority holds that the details of the Nicholls abduction and torture-murder are relevant to the issues of motive and intent.[1] While the murder itself is relevant, I believe the gruesome details of the murder are not. Even if the details of the Nicholls murder were relevant, evidence of the prior crime is admissible only if the probative worth of this evidence is not substantially outweighed by the tendency to prejudice the jury. In this case, the unfair prejudice to Lesko resulted in a denial of his right to a fair trial.

A.

The main issue at trial was the *degree* of Lesko's guilt - not whether or not he was guilty. The thrust of his defense was that he was guilty of, at most, felony-murder, because the killing of Officer Miller was not premeditated. The jury's refusal to find Lesko guilty of felony-murder and its finding, instead, that he was a principal to Travaglia's first-degree murder of Miller, was a likely result of the jury's reaction to the prosecutor's dwelling on the gruesome killing of Nicholls. *See United States v. Johnson*, 820 F.2d

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1. Lesko's counsel did not argue that the shooting was accidental. The majority acknowledges that the accidental shooting theory does not apply with respect to Lesko. Maj. typescript op. at 21.

1065, 1069 (9th Cir. 1987) ("[u]nfair prejudice is measured by the degree to which a jury responds negatively to some aspect of the evidence unrelated to its tendency to make a fact in issue more or less probable"). I agree with the views expressed by Judge Ackerman, who in dissenting from the Westmoreland County Court en banc, stated that:

> After reading Rutherford's testimony before the jury, I am constrained to conclude that its prejudicial impact outweighed its probative evidentiary value.
>
> . . . .
>
> All homicides are grim and juries are entitled to know all of the relevant facts pertaining to the particular case that they are sworn to hear, but to expect jurors or anyone else to consume the loathsome scenario described above pertaining to a completely different crime without feeling revulsion, passion and hatred for the perpetrators because of it, is contrary to my view of human nature. In addition, armed with the confessions of the defendants and an eye witness to the Miller homicide, it would seem to have been unnecessary.
>
> The details of how Mr. Nicholls was shot, kidnapped, robbed and tortured before he was thrown alive into a frozen lake would, in my opinion, cause a bias in the most devoted juror and standing alone would negate the presumption of innocence.

Commonwealth v. Lesko, Westmoreland County Court, No. 681 C 1980, slip op. at 4, 6 (en banc) (Ackerman, J., dissenting) (footnote omitted).

The Federal Rules of Evidence attempt to guard against such an unduly prejudicial use of evidence by requiring a balancing of the probative value against

the prejudicial effect.[2] In this case, the district judge found the probative value to be "non-existent." *Lesko v. Jeffes*, 689 F. Supp. 508, 515 (W.D. Pa. 1988). I agree. The majority opines, however, that "Rutherford's testimony is . . . probative to rebut Lesko's defense regarding his state of mind during the Miller incident." Maj. typescript op. at 22. The majority further states that "[w]here the motive of a killing is interference with law enforcement -- in this case the most extreme example, killing a policeman -- the severity and circumstances of the crime being hidden is highly probative." Maj. typescript op. at 22.

The only logical interpretation of the majority's reasoning is that the more prejudicial the evidence is, the more probative it becomes. What the majority fails to recognize, however, is that while the probative value may be increased by some small amount, the prejudice increases exponentially. Further, the probative value in this case, if any, is clearly diminished by the availability of other direct and sufficient evidence of the crime. Consequently, as the prejudice factor increased exponentially after Rutherford's testimony, the probative value of that testimony dwindled in light of the other evidence proffered by the Commonwealth.

This Court has acknowledged that "[i]n determining the admissibility of evidence, the circumstances surrounding the introduction of the testimony and the purposes for which it is sought to be introduced are critical." *United States ex rel.*

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2. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .

Fed. R. Evid. 403.

Choice v. Brierley, 460 F.2d 68, 71 (3d Cir. 1972). The extent to which the evidence may be cumulative or unnecessary may be considered in the balancing. The Advisory Committee Notes to Rule 404(b)[3] state that where the evidence of prior bad acts is offered for a permissible purpose, "[t]he determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence *in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403.*" (emphasis added). *See also Government of the Virgin Islands v. Felix*, 569 F.2d 1274, 1279-80 (3d Cir. 1978); *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 635 (3d Cir. 1977) ("A sensitive analysis of the need for the evidence as proof on a contested factual issue, of the prejudice which may eventuate from admission, and of the public policies involved is in order . . ."); *United States v. Cook*, 538 F.2d 1000, 1004 (3d Cir. 1976) ("This balancing test is the modern bastion of a long standing tradition that protects a criminal defendant from 'guilt by reputation' and from 'unnecessary prejudice'"); *see also Commonwealth v. Bond*, 261 Pa. Super. 311, 319, 396 A.2d 414, 418 (Pa. Super. Ct. 1978) ("even though evidence of prior crimes might be relevant, its admission must be based on a balancing of several considerations: on the one hand, *the actual need for the evidence in light of the issues and the other evidence available to the prosecution*

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3. Rule 404(b) provides:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

. . . and on the other hand, the degree to which the jury would probably be roused by the evidence to overmastering hostility") (emphasis added); *Commonwealth v. Ulatoski*, 472 Pa. 53, 63, 371 A.2d 186, 191 n.11 (Pa. 1977).

Under the facts of this case, the lurid details of the Nicholls homicide elicited from Rutherford were in no way necessary. In light of the eyewitness testimony and the confessions, the state would have had no difficulty proving that the offense was committed; that Lesko was at the scene; and that given the mere fact of the prior murder and the fact that the defendants were in Nicholls' car when they were spotted by Officer Miller, the defendants had a motive to kill Miller. The confessions of both Lesko and Travaglia, which were read to the jury in question and answer form in a dialogue between the prosecutors and police officers on the witness stand, clearly establish the motive to kill Officer Miller. For example, the Commonwealth introduced Travaglia's statement, containing among other damning admissions, the following:

> Q. Right. On the night this happened, can you tell us what happened?
>
> A. The shooting?
>
> Q. Yes.
>
> A. Well, I was playing around with him, trying to aggravate him, and I aggravated him, and I figured he couldn't chase me across the county lines; and since he did, I figured if I pointed the gun at him and told him to throw his gun away, he couldn't stop me and I could keep on going. In the process of pulling the gun on him, the hammer slipped and the shot discharged.
>
> Q. Okay. All right. And then after the shot discharged, then what happened?

A. I shot again.

. . . .

Q. Okay. And who loaded the weapon?

A. I loaded the weapon.

. . . .

Q. Okay. How many shots did you fire at the officer?

A. Just two.

. . . .

Q. All right. When you decided -- What made you decide to stop?

A. Well, the stolen vehicle.

. . . .

Q. Okay. When he -- Once the first shot was fired, what did he do then?

A. He stumbled backwards, and he fell down on one knee, and he started to get back up; that's when I fired the second one.

Trial Transcript at 682-90. Lesko' Westmoreland County counsel aptly stated that the prosecutor was "trying to kill a rabbit with a pumpkin ball instead of the buckshot that he should have." App. at 66.

The majority simply fails to offer any reason why the *details* of the Nicholls murder are relevant apart from the *fact* of the Nicholls murder. The majority, in several instances, refers to "Rutherford's account" or "Rutherford's testimony" in passages attempting to justify the admission into evidence of the lurid details. These terms fail to distinguish between the components of the account, i.e., between the mere fact of the murder and the details of the murder. For example, the majority states that "Rutherford's

account of the events leading to the Miller homicide conveys the temporal proximity of the Nicholls homicide, which reinforces the Commonwealth's theory that the Nicholls murder figured prominently in defendants' minds as Officer Miller approached the stolen sports car." Maj. typescript op. at 22 (footnote omitted). Such statements confuse and blur the distinction between the relevancy of the murder and that of the details. Perhaps this sentence can be construed, upon distillation, to say that the *details* are necessary to show the temporal proximity of the Nicholls murder. The temporal proximity, however, was never in dispute. In any event, the majority apparently concedes in this passage that the mere fact of the murder suffices to convey such proximity as the majority states that it was the "Nicholls *murder*" which figured prominently in the defendants' minds and not the *details* of the murder.

Additionally, the Commonwealth argued that the Nicholls murder was part of the "res gestae." App. at 79-81. The majority's apparent agreement and characterization of the events as a single criminal episode muddles the requirement of relevancy and effectively negates the presumption of innocence. The majority states that "[t]he jury could only have fairly evaluated the Commonwealth's theory regarding Lesko's state of mind by hearing evidence tending to show that Travaglia and Lesko had jointly embarked that evening on a crime spree . . . ." Maj. typescript op. at 24. The majority further states that, "to be in a position to evaluate Lesko's state of mind during the critical moments during the Miller encounter, the jury needed to hear sufficient details about [the Nicholls murder] to be able to appreciate the nature of the evening's joint undertaking ...." *Id.* at 25. Most astoundingly, the majority adds that "the Nicholls incident was not a 'prior crime' . . . ." Maj. typescript op. at 34.

Unlike the majority, I view the Miller homicide as a separate crime even though it occurred within hours of the Nicholls murder.[4] To enable a jury to infer specific intent to commit first degree murder from a description of a prior torture-murder effectively stripped Lesko of his presumption of innocence in the Miller trial. In this case, the evidence merely shows the "bad character" of the defendant. Such "bad character" evidence is inadmissible in light of the fact that Lesko did not even testify or in any way put his character in issue. Evidence is prejudicial if it "'arouses [the jury's] sense of horror, provokes its instinct to punish,' or otherwise '. . . cause[s] a jury to base its decision on something other than the established propositions in the case.'" *United States v. Guerrero*, 803 F.2d 783, 785 (3d Cir. 1986) (quoting *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980)); *see also United States v. Baillleaux*, 685 F.2d 1105, 1109 (9th Cir. 1982) ("the use of [other crimes] evidence must be narrowly circumscribed and limited" because of danger that the defendant will be convicted upon improper inference); *Government of the Virgin Islands v. Felix*, 569 F.2d 1274, 1280 (3d Cir. 1978)("What is required in order to permit testimony

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4. The difficulty in determining where one crime begins and another ends is illustrated in our recent decision in *United States v. Balascsak*, 873 F.2d 673, 683 (3d Cir. 1989) (in banc). While *Balascsak* involved an interpretation of the phrase "three previous convictions" as used in the Armed Career Criminal Act, we noted that "[d]etermining whether two crimes were 'committed on occasions different from one another' may often require an evidentiary hearing." *Id.* In *Balascsak*, two burglaries occurred some time between 10:45 P.M. and 7:00 A.M. We noted that "[w]e have no idea whether the interval was fifteen minutes or eight hours" or whether there was any "time to sober up and reconsider between the separate incidents." *Id.* Similarly, the majority here does not allow for the possibility that Lesko may have had a change of heart.

about other crimes, first of all, is that it be 'relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime'") (citation omitted). Certainly, the trial judge's limiting instruction -- given at the close of the case one week after Rutherford's elaborate recitation of the lurid Nicholls details -- could not remedy the prejudicial effect of Rutherford's testimony. For a jury to so limit their consideration would require "a feat of psychological wizardry verg[ing] on the impossible even for berobed judges." *United States ex rel. Scoleri v. Banmiller*, 310 F.2d 720, 725 (3d Cir. 1962), *cert. denied*, 374 U.S. 828 (1963). An image so astounding is, most probably, unforgettable. The likelihood of rational analysis prevailing after having heard Rutherford's testimony is minimal.

B.

The majority confidently states that "[a]s both a statutory and constitutional matter, the circumstances of the Nicholls murder were properly before the jury during the penalty phase." Maj. typescript op. at 30. For this proposition, they cite *Commonwealth v. Beasley*, 505 Pa. 279, 479 A.2d 460 (Pa. 1984) and *Zant v. Stephens*, 462 U.S. 862 (1983). I do not share the majority's confidence in the constitutionality of the jury's consideration of the details of the Nicholls murder in the penalty phase of the trial.[5]

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5. Aside from the question of whether *Beasley* is constitutional, it is not clear that the Pennsylvania Supreme Court would go as far as the majority suggests. In *Commonwealth v. Travaglia*, 502 Pa. 474, 467 A.2d 288 (Pa. 1983), the Pennsylvania Supreme Court considered several challenges to statements made by the prosecutor during the sentencing phase. The Supreme Court commented that:

> We again observe that the balance of principles which results in certain rules being appropriate at the "guilt

Zant appears to stand for the proposition that while statutory aggravating circumstances are constitutionally necessary at the stage of legislative definition as they describe the class of persons eligible for the death penalty, the Constitution does not require the jury to ignore other possible aggravating factors in a capital sentencing determination. While *Zant* deals with consideration of the *fact* of prior convictions which do not rise to the level of an aggravating circumstance, *Zant* arguably does not deal with the issue of consideration of the *details*

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phase" of a trial, may be struck differently at a hearing to determine appropriate penalty. The prosecutor's statement of his personal belief in the defendant's guilt can in no way be prejudicial where guilt has already been determined.

Prejudice might otherwise arise from a reference to the victim if such reference has the effect of arousing the jury's emotions to such a degree that it becomes impossible for the jury to impose sentence based on consideration of the relevant evidence according to the standards of the statute. We find the statements of the prosecutor in this case to have made minimal reference to the victim.

502 Pa. at 501-02, 467 A.2d at 302. The Pennsylvania Supreme Court seems to indicate that if the prosecutor had reminded the jury of the details of the Nicholls murder during the sentencing hearing, prejudice would be more likely to result. *See Travaglia*, 502 Pa. at 493-94, 501-02, 467 A.2d at 198, 302. I do not see this as a strong basis for distinction. The admission of the details in the guilt phase, even absent prosecutorial embellishment or misconduct, could work an injustice of constitutional magnitude upon a capital defendant in the sentencing phase.

Furthermore, in *Beasley*, the only evidence which came in was the fact that "the jury was informed that one of appellant's prior murder convictions involved the killing of a police officer, and that the jury in that case had returned a verdict of death." 505 Pa. at 289, 479 A.2d at 465 (footnote omitted). The Pennsylvania Supreme Court had already indicated in *Travaglia* that a prosecutor's "minimal reference to the victim" would not be offensive. Unlike the jury in the present case, the jury in *Beasley* was spared a graphic description of the murder.

which form the basis for the prior convictions.[6] The Supreme Court has not, heretofore, directly addressed this issue.[7]

The fact that a jury, and not a judge, is charged with sentencing makes it more likely that the jury will impose a sentence of death, not for the crime presently tried, but for the prior crime. In this case, where the prior crime is a heinous torture-murder, that possibility becomes a probability. Given that the jury heard that Lesko abducted Nicholls in his car; that Travaglia shot Nicholls in the arm and made him drive with this wound; that both Lesko and Travaglia verbally abused Nicholls; that Lesko physically battered Nicholls to a point of semi-consciousness;

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6. Indeed, much authority exists to support the proposition that *any* circumstances concerning the crime *for which the defendant is being presently sentenced* may be considered. *See e.g., Gregg v. Georgia*, 428 U.S. 153, 203-04 ("[s]o long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions"); *see also Williams v. Oklahoma*, 358 U.S. 576 (1959); *Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51 (1937).

7. I do not believe that the majority's citation of *Carolina v. Gathers*, 57 U.S.L.W. 4629, is apt. *See* Maj. typescript op. at 38. In *Gathers*, the United States Supreme Court affirmed the judgment of the Supreme Court of South Carolina which reversed Gather's sentence of death in light of the prosecutor's suggestion during the sentencing phase that the defendant deserved a death sentence because the victim was a religious man and a registered voter. The Supreme Court states that, "[a]t no time then, or otherwise during the guilt phase, was there any reference to the *content* of the papers [the victim] had with him." 57 U.S.L.W. at 4629. Thus, *Gathers* does not address the issue of whether the admission of evidence in the guilt phase may prejudice the jury in the sentencing phase, thereby depriving the capital defendant of due process.

and that Lesko assisted in tying a boulder to Nicholls and in throwing him into a frozen lake, the more likely result is that the jury sentenced Lesko to death, not for the murder of Miller where the evidence against him was scant, but rather, for the murder of Nicholls. Absent admission of the Nicholls details, the jury may have meted out a life sentence to Lesko given the scant evidence against him in the Miller trial. However, upon hearing the account of the prior torture murder, it is reasonable to conclude that few jurors would have had difficulty imposing a sentence of death.

The United States Supreme Court, in *Gregg v. Georgia*, 428 U.S. 153 (1976), commented on the danger of prejudice in cases where a *jury* may impose a capital sentence. The Court cited, with approval, statements by the drafters of the Model Penal Code including a statement that "[t]rial lawyers understandably have little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt." 428 U.S. at 191 (citing ALI, Model Penal Code § 201.6, Comment 5 at 74, Tent. Draft No. 9, 1959).[8] The Court noted that "[i]n other situations this Court has concluded that a jury cannot be expected to consider certain evidence before it on one issue, but not another." 428 U.S. at 190 n.40 (citations omitted).

Further, counsel for the state conceded at oral argument that the gruesome details would not be permitted in the penalty phase. The jurors were not specifically told during the penalty phase to disregard

8. This situation described is the converse of the one in the present case: the danger is that evidence which should only be admissible in the penalty phase may infect the determination of guilt in the guilt phase if admitted in the guilt phase.

the details of the Nicholls murder. Perhaps the state should not be permitted to use such a "backdoor" approach to "admit" inflammatory evidence for the jury's consideration in the penalty phase. This tactic is akin to telling someone who has just seen a "pink elephant" to forget about seeing the pink elephant.

II.

An equally troubling part of this case concerns an issue which, while not addressed by the district court, was the first argument presented in Lesko's habeas petition. While it may be more prudent not to initiate an examination which the district court will have to undertake on remand, I feel compelled to address what I view as a gross violation of due process which provides an alternative basis for granting the writ of habeas corpus.

In his Petition for Writ of Habeas Corpus to the United States District Court for the Western District of Pennsylvania, Lesko alleges the following violation of a plea agreement:

> 1. Petitioner's death penalty is in violation of the due process clause of the Fourteenth Amendment because it was obtained after the Commonwealth violated a plea agreement by admitting Petitioner's prior guilty plea to second degree murder into evidence during the penalty phase of Petitioner's trial.
>
> *Facts supporting this claim*
>
> 2. Prior to his trial for first degree murder in Westmoreland County, Petitioner entered into a plea agreement under which he plead guilty to second degree murder in Indiana County.
>
> 3. One of the material terms of the plea agreement was that Petitioner's guilty plea would

not be introduced into evidence at the murder trial in Westmoreland County.

4. During the penalty phase of Petitioner's trial for murder in Westmoreland County, the prosecutor, over proper objection by defense counsel . . . was allowed to introduce Petitioner's guilty plea to the Indiana County second degree murder charge into evidence.

5. In order to fulfill the terms of the Indiana County plea agreement, it is necessary to vacate Petitioner's death sentence and require the Commonwealth to either (1) conduct a new penalty trial at which Petitioner's guilty plea to the Indiana County murder charge is not introduced into evidence or (2) sentence Petitioner to life imprisonment.

Petition for Writ of Habeas Corpus at 9 (June 11, 1986). The district judge, in granting Lesko's Habeas Petition, only addressed the issue of the admissibility of the details of the Nicholls murder, stating in a footnote that "[i]n light of his disposition of the matter, the Court finds it unnecessary to address the remaining issues raised by the petitioner." *Lesko v. Jeffes*, 689 F. Supp. 508, 510 n.1.

Whether or not the plea agreement was impermissibly used in the Westmoreland County trial is an issue which unquestionably impinges on Lesko's fundamental due process rights. If it is true that the agreement was breached by the government, the guilty plea in Indiana County could not have counted as one of the two aggravating circumstances which the jury found during the sentencing phase of the trial. The same result applies if the plea is found to be involuntary. The difficulty of this issue is magnified by the complicated procedural history of the case. Therefore, a review of the procedural history as it relates to the plea may be useful.

A.

In 1980, Lesko was awaiting trial on charges of criminal homicide in both Indiana County and Westmoreland County. On May 19, 1980, Lesko agreed to plead guilty to second degree murder in Indiana County with the understanding that related charges would be dismissed and sentencing would be deferred. At all times, with regard to the Indiana County proceedings, Lesko was represented solely by Attorney John Armstrong of Indiana County, Pennsylvania. The plea colloquy was transcribed and makes no mention of an agreement not to introduce the Indiana guilty plea in Westmoreland County. Surprisingly, no written record of the plea bargain exists.[9]

Lesko filed a motion to withdraw his guilty plea in the Indiana case on December 3, 1980, prior to his trial in Westmoreland County. In January of 1981, Lesko was tried in Westmoreland County for Officer Miller's murder. At the sentencing hearing, the Commonwealth called an assistant district attorney from Indiana County to establish that Lesko had been previously convicted of an offense "for which a sentence of life imprisonment . . . was imposable." 42 Pa. Cons. Stat. Ann. § 9711 (a)(10). *See* Sentencing Hearing Transcript at 1389-93. Though this testimony was objected to on the ground that there was no conviction as sentence had not yet been imposed, there was, at this time, no request for an evidentiary hearing to establish a breach of the plea

9. Lesko raised the claim of ineffective assistance of counsel for the first time on appeal from the denial of his motion to withdraw his guilty plea. *See Commonwealth v. Lesko*, 502 Pa. 511, 514, 467 A.2d 307, 308 (Pa. 1983). Without any evidentiary hearing, the Pennsylvania Supreme Court rejected the claim. Because Lesko has not raised this claim in his petition, I decline to comment on the possible merits of such a related claim.

agreement. Lesko's Westmoreland County counsel did state that "Mr. Lesko and his counsel in Indiana County had moved the Court to withdraw the guilty plea, and that has not been resolved." Sentencing Hearing Transcript at 1404. At this time, Lesko's counsel requested an evidentiary hearing only on the question of the pendency of the motion to withdraw the guilty plea. *Id.* at 1427-28.

On direct appeal from the imposition of the death penalty, Lesko raised the issue that the lower court erred in permitting the Commonwealth to introduce Lesko's guilty plea to the Nicholls killing as an aggravating circumstance. The alleged breach by the Commonwealth of its plea bargain agreement with Mr. Lesko was explicitly argued in Lesko's brief. However, the Pennsylvania Supreme Court did not discuss the matter in its majority opinion and order. *See Commonwealth v. Travaglia*, 502 Pa. 474, 467 A.2d 288 (Pa. 1983). *But see* 502 Pa. at 507-08, 467 A.2d at 305 (Nix, J., concurring) (stating that he joins "in the Court's mandate today with the caveat that the death penalty will be carried out only after a review of [the challenges to the pleas] by this Court and only if after such review it is determined that the pleas were voluntarily and knowingly entered and the request for withdrawal was properly refused"). The issue was also briefed by Lesko's counsel in his Application for Reargument. *See* Brief for Appellant at 4. This Application was denied.

After his conviction in the Westmoreland County case, Lesko filed an amended motion to withdraw his Indiana County guilty plea on April 13, 1981. He alleged a breach of the plea agreement because an "implicit" part of the agreement was that the Indiana County homicide would not be used in the penalty phase in Westmoreland County. A hearing was held on this motion. Lesko's Indiana County lawyer, John

H. Armstrong, stated during the hearing that "[i]t was implicit in that [plea] agreement that this [the Indiana guilty plea] was not being used for the purposes of showing a conviction here in Indiana County." *See* Record of Proceedings (April 28, 1981) at 9. Lesko did not testify concerning his understanding of the agreement. Armstrong presented no other evidence concerning what, if anything, he told Lesko concerning the plea agreement. He explained his legal opinion (which later proved to be faulty) that the plea could not be used to establish an aggravating factor unless a sentence had been imposed. The District Attorney testified that there was never any discussion of this implicit agreement. *Id.* at 37-40.

The Indiana County trial judge rejected Lesko's claim and denied his motion to withdraw on June 5, 1981. It is apparent from the trial judge's "Findings of Fact" that he found that the entire plea agreement was as set forth during the guilty plea colloquy as there was no written record of the actual bargain struck. *See* Opinion and Order of the Court (June 6, 1981) at 6. The government agrees that the trial judge found the entire agreement to be embodied in the plea colloquy as transcribed. *See* Appellant's Letter Memorandum (dated February 27, 1989) at 2, 3. Thus, the trial judge failed to consider the allegations of an implicit agreement arising out of any other discussions which may have occurred.

Despite the assertions of Lesko's attorney in open court, the Indiana County trial judge found "that the defendant's assertions are fiction and that the defendant knowingly, voluntarily, and intelligently entered his plea as part of his Westmoreland County 'death trial' strategy." Opinion and Order of the Court at 6 (June 6, 1981).[10] It is apparent from the

10. It should be noted that Armstrong, Lesko's Indiana counsel, was representing him at the time and thus, did not actually testify.

remaining Findings of Fact that the trial judge was considering only the plea colloquy as transcribed which as all parties acknowledge, makes no reference to the implicit agreement which allegedly induced Lesko to plead guilty.

The "breach of the plea" issue was raised as the first argument in Lesko's Petition for Post Conviction Relief. The Court of Common Pleas of Westmoreland County refused Lesko's request for an evidentiary hearing.During the Post Conviction Hearing Act proceedings, Common Pleas Judge Mihalich, without hearing the testimony of Armstrong, based his refusal to hear this evidence on the ground that the testimony was irrelevant because he believed the matter had been previously considered by the Pennsylvania Supreme Court in *Commonwealth v. Lesko*, 502 Pa. 511, 467 A.2d 307 (Pa. 1983), which upheld Lesko's conviction in the Nicholls murder case in Indiana County. Furthermore, Judge Mihalich based his refusal to hear evidence on the mistaken notion that a district attorney's plea agreement in one county of Pennsylvania cannot be binding in another county of the Commonwealth.[11]

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11. The following colloquy between Judge Mihalich and Counsel for Lesko, Welsh White, during the Post Conviction Hearing proceedings in Westmoreland County, illustrates the attempt by counsel to distinguish between the issues litigated before the Supreme Court of Pennsylvania and the issue of the alleged broken plea agreement:

> MR. WHITE: I would submit to Your Honor that, as Mr. Marsh has said, the Pennsylvania Supreme Court never had before it Mr. Armstrong's testimony concerning the exact terms of the bargain made between him and the district attorney of Indiana County. In Justice Nix's opinion, which Your Honor referred to, the Court was ruling in effect that a guilty plea with deferred sentencing may, under Pennsylvania Law, may be properly introduced at a subsequent murder prosecution.

While the Pennsylvania Supreme Court did conclude in *Commonwealth v. Lesko*, 502 Pa. 511,

THE COURT: That is what I did.

MR. WHITE: We are not challenging that. We challenged that before the Pennsylvania Supreme Court and we agree that issue is finally determined.

The new issue we wanted to raise here is it was an understanding between counsel and the basis of the defendant's guilty plea that the guilty plea in Indiana County would not be introduced in Westmoreland County.

THE COURT: Yes, but I was not a part of that agreement nor was the district attorney of Westmoreland County a part of that agreement. So how is it relevant here? We didn't breach any of his rights. We didn't agree that would be a part of the plea. To me it was immaterial then and, unless you impress me with something else, it's immaterial now.

MR. WHITE: If we can establish that the bargain between Indiana County district attorney and Mr. Armstrong was that the guilty plea was not to be introduced at any subsequent criminal trial, then we would submit we are entitled to specific performance and we would cite --

THE COURT: What are you doing here? I can't give you that specific performance. Indiana County can.

MR. WHITE: Not at this point. Because the agreement has already been breached. The agreement that was made between counsel prior to the Indiana County trial was that the guilty plea would not be introduced at any subsequent proceeding. Now may be that counsel of Indiana County lacked the power to implement the terms of that agreement. But if so, he presented the defendant with an illusory promise. He was promising the defendant something he was unable to perform.

THE COURT: If it has any relevance, has any legal effect, don't you agree it belongs in Indiana County?

MR. WHITE: Not at this point. The defendant really has no objection to the guilty plea in Indiana County because he was willing to plead guilty to murder in that county solely upon the basis that that would not be used in the subsequent trial in Westmoreland County.

. . . .

518, 467 A.2d 307, 310 (Pa. 1983) that "[t]he Appellant argues that by the terms of the agreement,

> THE COURT: My ruling was it's immaterial. It's not a part of this evidence.
> MR. MARSH: It is our position that the Commonwealth is a unified judicial system: that the Commonwealth is not various fiefdoms in Indiana County and Westmoreland
> County; the district attorney representative of the Commonwealth in Indiana County binds the Commonwealth in any other county by his agreement. And I know this Court has previously stated it did not feel bound by any agreement between the Commonwealth and the defendant in Indiana County. Of course, the basis of our petition here is that is not the law; that what the Commonwealth agrees to in Indiana County must be honored in Westmoreland County; and that the district attorney of Indiana County and the district attorney of Westmoreland County are bound by prior agreements between the Commonwealth and the defendant.
> . . . .
> THE COURT: It is my ruling that that testimony that you present in your offer is irrelevant to this case.

Post Conviction Hearing Proceedings, Held January 28, 1985, No. 681 of 1980 at 7-14 (emphasis added). As the above-cited portions of the record indicate, Lesko's counsel attempted to distinguish between the issues previously addressed and the "new issue" of whether Lesko's plea was induced by his counsel on the basis of a promise which was unfulfilled.

In denying Lesko's motion for an evidentiary hearing, Judge Mihalich noted that he could not be bound by a plea entered into in Indiana County. This is clear error. In Pennsylvania, it is well established that the prosecuting attorneys of the Commonwealth's various counties each represent the Commonwealth of Pennsylvania. *See Commonwealth ex rel. Specter v. Martin*, 426 Pa. 102, 113, 232 A.2d 729, 736 (Pa. 1967) (district attorneys do not perform their duties on behalf of either a county or a city, but rather, "*all* of the duties of the district attorney are performed on behalf of the Commonwealth.") (emphasis in original); *Commonwealth ex rel. Specter v. Freed*, 424 Pa. 508, 517 228 A.2d 382, 386 (Pa. 1967) ("the district attorney is essentially a state officer whose powers, duties and

the Indiana County conviction could not be used in his Westmoreland County trial" and that "[w]e have reviewed the record and find no such agreement," the Commonwealth never bothered to hear Lesko's proffered evidence, including the testimony of his attorney, Armstrong, who represented him in Indiana County, Pennsylvania.

B.

Attorney Armstrong was apparently willing to testify that Lesko's guilty plea was induced by a promise that the plea would not be used as an aggravating circumstance in the trial in Westmoreland County. For example, at the Post-Conviction Hearing Act proceedings, Lesko's Westmoreland County counsel offered to show that:

> Mr. Armstrong . . . entered into a plea bargain arrangement with the district attorney of Indiana County; that that plea bargain was that Mr. Lesko would enter a plea of guilty to murder of the second degree concerning Mr. Nicholls; that sentence would not be imposed on that plea until after the trial on the Miller homicide in Westmoreland County; and it was understood that that arrangement was for the purpose that the guilty plea to the Nicholls homicide would not be introduced as a prior conviction in the Westmoreland County proceedings; that that was the understanding between the district attorney of Indiana County and Mr. Armstrong; *that was what Mr. Armstrong conveyed to Mr. Lesko as the*

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functions are not affected by the [Philadelphia City] Charter"). Accordingly, a plea agreement made by the district attorney of Indiana County is made on behalf of the Commonwealth of Pennsylvania. Thus, the terms are binding on the Westmoreland County district attorney when that district attorney represents the Commonwealth in a subsequent prosecution.

> *essence of the agreement; that Mr. Lesko understood that if he pleaded guilty to second degree murder of Mr. Nicholls, that that would not be used as a prior conviction in the Miller case*; that that agreement was violated by the district attorney of Westmoreland County introducing that plea in Indiana County as a conviction, prior conviction in the Miller case.

See Post Conviction Hearing Act Transcript at 3 (emphasis added). The Commonwealth objected to the proffered testimony of Attorney Armstrong claiming that the matter had been finally litigated in the earlier appeals to the Pennsylvania Supreme Court. Lesko's Petition was dismissed.

On appeal, the Supreme Court affirmed the dismissal of the Post Conviction Hearing Act petition, rejecting the claim of a breached agreement and agreeing that this issue had been "finally litigated."[12]

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12. Pennsylvania's Post-Conviction Hearing Act provides that: "To be eligible for relief under [it], a person . . . must prove . . . (4) That the error resulting in his conviction and sentence has not been finally litigated or waived." 42 Pa. Cons. Stat. Ann. § 9543(4)(1982) (This section has been suspended by Pa. R. Crim. P., Rule 1507, 42 Pa. Cons. Stat. Ann., insofar as it is inconsistent with Rules (Supp. 1988)).

The Act further provides that "an issue is finally litigated if: . . . (3) the Supreme Court has ruled on the merits of the issue." 42 Pa. Cons. Stat. Ann. § 9544(a)(3)(1982) (also suspended (Supp. 1988)).

It is also highly unlikely that this issue could be deemed to be waived under Pennsylvania law. *See Commonwealth v. Zettlemoyer*, 500 Pa. 16, 50, 454 A.2d 937, 955 n.19 (Pa. 1982), *cert. denied*, 461 U.S. 970 (1983). In *Zettlemoyer*, the Pennsylvania Supreme Court recognized the qualitative difference between death and any other permissible form of punishment by relaxing the rules of waiver which would normally preclude review of the merits of this claim. The court stated:

> The primary reason for this limited relaxation of waiver rules is that, due to the final and irrevocable nature of

See Commonwealth v. Lesko, 509 Pa. 67, 81-87, 501 A.2d 200, 207-10 (Pa. 1985). The Pennsylvania Supreme Court determined that Lesko's argument that he "believed" the terms of the bargain would preclude use of the Nicholls murder as an aggravating circumstance was only a "variant" of his argument made during the hearing to withdraw his plea -- namely, that there was an "implicit" agreement between Lesko and the state. 509 Pa. at 85-86, 501 A.2d at 208. I believe that this was an error which resulted in a denial of due process.

Three related types of challenges to guilty pleas should be carefully distinguished. First, a defendant may assert that an explicit agreement between the state and him has been breached. Second, a defendant may assert that his attorney misapprehended the nature of the state's case or the likely penalties attached to alternative courses of action.[13] Finally, a defendant may assert that his counsel induced him to plead guilty by conveying to the defendant that the state has unequivocally agreed to some course of action, when in fact, unbeknownst to the defendant, the attorney has no such agreement.

> the death penalty, the appellant will have no opportunity for post-conviction relief wherein he could raise, say, an assertion of ineffectiveness of counsel for failure to preserve an issue or some other reason that might qualify as an extraordinary circumstance for failure to raise an issue. . . . Accordingly, significant issues perceived *sua sponte* by this Court, or raised by the parties, will be addressed and, if possible from the record, resolved.

500 Pa. at 50, 454 A.2d at 955 n.19. Thus, any argument that Lesko waived this claim because he could have raised it but did not, fails. *See also Commonwealth v. McKenna*, 476 Pa. 428, 439-41, 383 A.2d 174, 180-81 (Pa. 1978).

13. Such a challenge, today, would be unsuccessful under *Brady v. United States*, 397 U.S. 742 (1970).

The Pennsylvania Supreme Court's characterization of Lesko's proffered argument as a mere "variant" fails to make the crucial distinction between the establishment of the *existence* of the plea and the issue of the *voluntariness* of the plea -- or between the first and the third types of challenges. The third challenge concerns only what may have transpired between Lesko and his Indiana County counsel. Yet the statements relied on by the state courts to deny Lesko's claim pertain only to the statements by the state denying the existence of an implicit agreement.[14] Consequently, Lesko has never been given the opportunity to address the issue of whether he was induced to plead guilty by his Indiana County counsel who led him to believe that his Indiana County plea could not be used against him in Westmoreland County. Clearly, this is a different issue from whether or not the state promised him directly that the plea would not be used.

Significantly, Lesko's present Westmoreland County counsel state now represent to this Court that:

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14. The Pennsylvania Supreme Court, in affirming the denial of Post-Conviction relief, merely relied on statements made during the hearing on Lesko's petition to withdraw his plea and on the plea colloquy. *See Commonwealth v. Lesko*, 509 Pa. 67, 82-84, 501 A.2d 200, 208 (Pa. 1985).

On a prior occasion, the Pennsylvania Supreme Court, in affirming the denial to withdraw Lesko's plea, based its denial of an evidentiary hearing by referring to the same statements -- the plea colloquy during the proceedings in the Indiana County action and the statements made in a proceeding in connection with Lesko's motion to withdraw his plea. *See Commonwealth v. Lesko*, 502 Pa. 511, 514, 467 A.2d 307, 308 (Pa. 1983).

It is noted that in the latter proceeding, Lesko was not represented by counsel who had been appointed to defend him in the death penalty case. Lesko's Westmoreland County counsel were not notified of this proceeding and thus, could not participate. It is difficult to see how Attorney Armstrong could act both as witness and as counsel at the same time.

> Mr. Lesko's Westmoreland County counsel had no opportunity to participate for the purpose of presenting evidence or cross-examining other witnesses. Mr. Lesko has indicated to Mr. White and me, however, that his agreement with the District Attorney of Indiana County was that if he entered a plea of guilty to the Nicholls homicide, that plea would not be entered in the Westmoreland County trial on the Miller homicide. At this point it would be appropriate to point out that Mr. White and I have also never had the opportunity to present the testimony of our client, in any proceedings, concerning this issue.

Appellee's Letter Memorandum at 2 (February 15, 1989). Based on all of Lesko's counsels' representations, if believed, it is clear that Lesko believed the plea agreement to include a promise by the State not to use the plea in the Miller case. In any event, it appears to be a material fact in dispute.

I acknowledge that if Lesko relied on his attorney's faulty analysis of the law with respect to whether a deferred sentence would count as a conviction -- the second type of challenge described above -- this reliance would be insufficient to render a guilty plea invalid on a collateral attack. *See Brady v. United States*, 397 U.S. 742 (1970). In *Brady*, the petition entered a knowing and voluntary plea of guilty to kidnapping in violation of 18 U.S.C. § 1201(a). In *United States v. Jackson*, 390 U.S. 570 (1968), nine years after Brady's plea, the United States Supreme Court ruled that the provision of section 1202(a) which provided for the death penalty only upon the recommendation of the jury was unconstitutional. In assessing the validity of Brady's plea on review of a collateral attack, the Supreme Court in *Brady* stated that:

> A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.

397 U.S. at 757 (citation omitted).

"[I]t is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *United States v. Broce*, ___ U.S. ___, ___, 109 S. Ct. 757, 765 (1989) (quoting *Mabry v. Johnson*, 467 U.S. 504, 508 (1984)). Yet the fact that Lesko may have been induced by his counsel to believe that his plea would not count as an aggravating circumstance is an issue which goes to the voluntariness of his plea which may be the basis for a collateral attack. This Court has stated that "the district court must hold an evidentiary hearing where there is a material dispute of fact, unless the state court provided the petitioner a full and fair evidentiary hearing on the issue." *Bibby v. Tard*, 741 F.2d 26, 31 (3d Cir. 1984); *see also Sullivan v. Cuyler*, 723 F.2d 1077, 1084 (3d Cir. 1983)("Federal courts, in habeas proceedings, must accord a presumption of correctness to state factfindings. That presumption is inoperative, however, if the merits of the factual dispute were not resolved in the state hearing. In such circumstances, the federal court must grant an evidentiary hearing to a habeas applicant.") (citations

omitted). The fact that Lesko has been denied an evidentiary hearing on this point is a gross violation of due process as it resulted in improper sentences in two cases.

The United States Supreme Court's decision in *Blackledge v. Allison*, 431 U.S. 63 (1977), indicates that an evidentiary hearing should be held. In *Blackledge*, the United States Supreme Court affirmed an order of the court of appeals remanding a habeas corpus petition by a state prisoner to the district court for a hearing on the merits, if needed. The Court found, under the facts of that case, that the record of a state guilty plea proceeding was inconclusive with regard to the claim for relief in the habeas petition. The state court record consisted only of a preprinted, thirteen question "Transcript of Plea" which made no mention of any plea agreement. 431 U.S. at 65-67.

In his habeas petition, Allison alleged, in more than conclusory language, that he pleaded guilty because of an express promise not reflected on this form. *Id.* at 67-69. The Court expressed its reluctance to allow state prisoners to so challenge apparently valid guilty pleas in federal habeas proceedings. It noted, however, that there were circumstances, as those alleged by Allison, in which the federal court would be required to hold an evidentiary hearing on the claim before acting on its merits. In reaching this decision, the Court considered it important that plea bargaining had only recently been given official approval at the time Allison entered his state court plea on January 24, 1972. *See Santobello v. New York*, 404 U.S. 257 (1971). The Court noted that North Carolina had, since Allison's plea, adopted stringent procedures for plea bargaining "in part to prevent the very kind of problem now before us." 431 U.S. at 79 (footnote omitted). The Court said:

> Had these commendable procedures been followed in the present case, Allison's petition would have been cast in a very different light. The careful explication of the legitimacy of plea bargaining, the questioning of both lawyers, and the verbatim record of their answers at the guilty-plea proceedings would almost surely have shown whether any bargain did exist and, if so, insured that it was not ignored.

431 U.S. at 79 (footnote omitted).

The Indiana County district attorney's testimony that there was no such agreement is not dispositive if the issue is the voluntariness of the plea based on Lesko's subjective understanding of the plea agreement as induced by his Indiana County lawyer. Because "[s]olemn declarations in open court carry a strong presumption of verity[.]" *Blackledge*, 431 U.S. at 74, it is significant that Lesko's Indiana County counsel declared in open court that there was such an implicit understanding. Lesko's Westmoreland County counsel have also made similar representations. *See* Appellee's Letter Memorandum (February 15, 1989). Indeed, "[i]n administering the writ of habeas corpus and its § 2255 counterpart, the federal courts cannot fairly adopt a *per se* rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment." 431 U.S. at 75 (footnote omitted).

While the Supreme Court in *Blackledge* was careful to state that in some cases an evidentiary hearing would not be required, it did state that the petitioner is "entitled to careful consideration and plenary processing of [his claim] including full

opportunity for presentation of the relevant facts." *Id.* at 82-83 (citation omitted).

C.

As a result of the Commonwealth's failure to properly assess the voluntariness of Lesko's plea, Lesko's guilty plea was improperly introduced into evidence in the penalty phase of his capital trial in Westmoreland County. The introduction was highly prejudicial to Lesko given that Lesko's prior conviction for second degree murder is an aggravating circumstance as defined by 42 Pa. Cons. Stat. Ann. § 9711 (d)(10).[15] In imposing the death penalty, the jury indicated that mitigating circumstances were present. Thus, the jury was authorized by the statute to impose death only if the "aggravating circumstances . . . outweigh any mitigating circumstances." 42 Pa. Cons. Stat. Ann § 9711(c)(iv). In sentencing Lesko to death, the jury expressly found this aggravating circumstance (the Nicholls murder) and further concluded that the two aggravating circumstances present were sufficient to outweigh all mitigating circumstances. Specifically, the jury found as follows:

> JUROR NO. 5: This 3rd day of February, A.D., 1981, we, the jury, unanimously sentence the

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15. 42 Pa. Cons. Stat. Ann. § 9711(d)(10) provides:

> (d) Aggravating circumstances. -- Aggravating circumstances shall be limited to the following:
>
> . . . .
>
> (10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

defendant, John Charles Lesko, to death.

We, the jury, have found unanimously one or more aggravating circumstances which outweigh all the mitigating circumstances.

The aggravating circumstances we have found are: The victim, Leonard Clifford Miller, was a peace office who was killed in the performance of his duties. A policeman is a peace officer.

Two: The defendant has been convicted of another crime, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable.

N.T. 1731-32.

It is clear that an improper introduction of Lesko's prior conviction would have contributed to the jury's sentence of death. If one of the aggravating circumstances were removed, it is impossible to determine whether or not the jury would have imposed a death sentence. In any event, "[i]n a case involving a decision as important as life and death we are not in a position to speculate about what decision the jury might have reached had it not considered one [of the two] particular aggravating circumstance[s]." *Commonwealth v. Travaglia*, 502 Pa. at 509, 467 A.2d at 306 (Pa. 1983) (Nix, J., concurring). The denial of at least an evidentiary hearing to determine the validity of Lesko's guilty plea violates all notions of due process.

The United States Supreme Court in *Zant v. Stephens*, 462 U.S. 862, 885 (1983) stated that, "although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." Surely an attack upon the validity of a guilty plea that has been used as a

basis for a finding of an aggravating circumstance constitutes the type of contention that must be reviewed before the execution of the capital sentence may be allowed.

Accordingly, because I would affirm the district court's grant of the Writ of Habeas Corpus, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

90-1880

Supreme Court, U.S.
FILED
JUN 7 1991
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

JOHN CHARLES LESKO,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
VOLUME II

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 86-1238

JOHN CHARLES LESKO,
Petitioner

v.

GLEN R. JEFFES, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional institution at Rockview; HENRY G. BARR, General Counsel of Pennsylvania; and LEROY ZIMMERMAN, Attorney General of the Commonwealth of Pennsylvania,
Respondents

MEMORANDUM OPINION

BLOCH, District J.

Petitioner John Chales Lesko has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, setting forth numerous contentions of error arising out of his trial, con-

viction and sentence on charges of criminal homicide and criminal conspiracy in the Court of Common Pleas of Westmoreland County, Pennsylvania. The Court concludes that petitioner was deprived of his right to a fair trial guaranteed by the Fourteenth Amendment and, therefore, grants the writ.[1]

I. Facts

Early in the morning of January 3, 1980, Officer Leonard Miller was killed by two bullets fired from a .38 caliber revolver. His body was discovered by fellow police officers who had heard his radio message stating the he had been shot. Testimony at trial revealed that shortly before the shooting, Miller was observed in his patrol car in the parking

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[1]In light of this disposition of the matter, the Court finds it unnecessary to address the remaining issues raised by petitioner.

parking lot of a local convenience store. A Lancia sports car was observed repeatedly driving past the officer at a high rate of speed.

The primary Commonwealth witness at trial was Richard Rutherford, a juvenile who had been present with the petitioner and his co-defendant Michael Travaglia throughout the evening of January 2-3 1980. Rutherford testified that upon observing Officer Miller in his patrol car at the side of the road, Travaglia, the driver of the automobile in which the three men were riding, stated that he wanted to "have some fun with this cop." He then sped past the officer's car and beeped the horn. When the officer did not pursue the car, Travaglia turned around and sped past him again, at which point Miller gave chase. After a short time, Miller forced the car to the side of the road.

Travaglia rolled down the window on the driver's side of the car and, as Miller approached, fired two shots, at least one of which struck the officer. The officer returned fire, striking the passenger window of the automobile.

The statements of Travaglia and petitioner were introduced at trial. Travaglia maintained that he shot Miller accidentally when the hammer of the gun slipped and a shot was discharged. Petitioner stated that the purpose of speeding past Miller was to draw him away from the convenience store so that they later could return and rob it.

Rutherford gave additional testimony that, later the same day, Travaglia and petitioner met one Daniel Montgomery in downtown Pittsburgh at which time Travaglia gave Montgomery a .38 caliber revolver and stated that he had "shot a cop." The revolver later was recovered

from Montgomery; ballistics tests established that it was the weapon from which the shots which had killed Miller had been fired.

The Lancia automobile was recovered following the shooting and was identified as being registered in the name of William Nichols; Nichols' wallet was found in the car. The right passenger window had been shot out. Analysis of glass fragments retrieved from the areas where Miller's body was found revealed the fragments were of the same type as the glass in the windows of the Lancia automobile. A lead slug removed from the vehicle was identified by the Commonwealth's ballistics expert as having been fired from Miller's .357 magnum service revolver.

II. Procedural History

Petitioner was charged with first degree murder and criminal conspiracy to

commit murder in connection with the death of Officer Miller. Following lengthy jury selection proceedings, the trial in petitioner's case commenced January 21, 1981, in the Court of Common Pleas of Westmoreland County, Pennsylvania. Defendant was tried jointly with Michael Travaglia. The evidence presented at trial documented that Travaglia was the primary actor in the charged offense; the jury was instructed that petitioner could be found guilty of the murder of Officer Miller only as an accomplice. On January 30, 1981, a verdict of guilty of murder of the first degree and guilty of criminal conspiracy was returned against both defendants.

The sentencing phase of the trial immediately followed return of the jury's verdict; evidence was presented concerning aggravating and mitigating

circumstances pursuant to 42 Pa.C.S.A. § 9711. The jury determined that a sentence of death was appropriate as to both defendants.

Post-trial motions were filed by petitioner with the Court of Common Pleas of Westmoreland County, which motions were denied by order of April 5, 1982. On April 23, 1982, the Court of Common Pleas formally imposed a sentence of death upon petitioner.

Petitioner then filed an appeal from the judgment of conviction and sentence with the Pennsylvania Supreme Court. By order dated September 29, 1983, the Court affirmed the judgment of conviction. Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1983). Reargument was denied on December 14, 1983.

On February 13, 1984, petitioner filed a petition for a writ of certiorari

with the United States Supreme Court. The writ was denied on June 18, 1984. Lesko v. Commonwealth, 467 U.S. 1256 (1984).

Having completed the remedies available to him on direct appeal, petitioner then filed a petition for post-conviction relief with the Court of Common Pleas of Westmoreland County, pursuant to the Pennsylvania Post-Conviction Hearing Act, 42 Pa.C.S.A. § 9541, et seq. The petition was denied on June 11, 1985. On July 10, 1985, petitioner filed an appeal from the order of June 11, 1985, with the Pennsylvania Supreme Court. In an order dated November 12, 1985, the Supreme Court affirmed the trial court's denial of post-conviction relief. Commonwealth v. Lesko, 509 Pa. 67, 501 A.2d 200 (1985). Rehearing was denied on April 2, 1986.

On May 31, 1986, petitioner filed a second petition for a writ of certiorari with the United States Supreme Court, which was denied on February 23, 1987. Commonwealth v. Lesko, ___ U.S. ___, 107 S.Ct. 1328 (1987).

The instant petition was filed with this Court on June 11, 1986. The following day, this Court granted petitioner's request for a stay of execution, having found that the petition for habeas corpus presented a substantial question on the merits, i.e., whether a jury instruction during the penalty phase of a capital case directing the jury not to be swayed by sympathy for the defendant violated the defendant's rights under the Eighth Amendment to the United States Constitution.

A substantially similar issue was pending review before the United States

Supreme Court in the case of California v. Brown, cert. granted, 476 U.S. 1157 (1986). Accordingly, the parties' obligation to address the merits of the habeas corpus petition was stayed pending the Supreme Court's decision in the Brown case, which was rendered January 27, 1987. ___ U.S. ___, 107 S.Ct. 837 (1987). Following the Brown decision, a briefing schedule was established. Briefs having been received, the case is ripe for disposition on its merits.

III. The Issue Presented

During the guilt phase of the trial, the Commonwealth introduced evidence, over petitioner's objection, of another homicide which he and Travaglia had committed on the same evening as the Miller homicide. Petitioner contends that the admission of this evidence deprived him of his right to a fair trial, guaranteed

by the Fourteenth Amendment. (Petition, pp. 25-33).

The evidence in question concerned the murder of William Nichols' the owner of the Lancia sports car. The facts of the Nichols' homicide were presented to the jury through the testimony of Richard Rutherford.

Rutherford's testimony was as follows. On the evening of January 2, 1980, Travaglia abducted Nichols from the Edison Hotel Bar in the City of Pittsburgh. In the company of petitioner and Rutherford, Travaglia forced Nichols to drive out of the City of Pittsburgh. Upon entering the car and before leaving the City, Travaglia produced a gun and shot Nichols in the arm. After traveling some distance, Nichols was handcuffed and placed in the back seat of the automobile. As the evening progressed, petitioner

repeatedly punched the wounded and bound man in the face with his fists, taunting him with a knife, calling him a "queer" and asking him if he wanted to perform deviate sexual acts. Travaglia, driving the automobile, would occasionally slow down to strike the victim. Nichols repeatedly pleaded with petitioner and his co-defendant to stop and asked what they intended to do to him.

Eventually Nichols slipped into unconsciousness. His scarf was cut in half and part of it stuffed into his mouth. The remaining part was tied around his head as a gag. Travaglia then stopped the car in a wooded area by a frozen lake. Nichols was dragged from the car, still handcuffed and with his feet bound. Travaglia and petitioner then dragged Nichols across the edge of the frozen lake to a hole which they had broken in the ice. Although Rutherford

testified that he did not see Nichols enter the water, he stated that, as they left the scene, Travaglia commented that Nichols came up one time, was coughing and then disappeared beneath the surface of the water.

Prior to the introduction of this evidence, petitioner's counsel moved to have the evidence excluded. Counsel argued that the evidence was irrelevant and could have no bearing upon any motive attributable to petitioner. This motion was denied. Counsel than requested that the court review the statements of Travaglia and petition prior to ruling on the admissibility of Rutherford's testimony, since the statements contained matters relating to motive. The court agreed to do so, and following review of the same, ruled that the evidence was relevant to the issues of motive and the defendants' state of mind

in that it tended to reduce the possibility that the Miller homicide was an accident and had a bearing upon the degree or homicide at issue. In addition, the trial judge ruled that the evidence of the Nichols' killing was admissible because it was an event closely related to the murder of Officer Miller, in that the two murders occurred within the space of three or four hours. Thus, the judge ruled, the two homicides could be seen as a single series of events.

Weighing the probative value of this evidence against its potential for prejudice, the trial judge determined that its tendency to counteract Travaglia's assertion that the killing of Officer Miller was a mistake outweighed whatever prejudice would be caused by its admission.

Petitioner's counsel moved that the testimony be limited to the fact that Nichols' car was stolen and that Nichols was killed, there being no need to present the lurid details of the killing to the jury. The motion was denied. Accordingly, Rutherford was permitted to testify, not simply to the fact of the Nichols' killing but also to the details surrounding Nichols' death, as set forth above.

The judge at this point in the trial did not instruct the jury regarding the limited purposes for which the evidence of the Nichols' homicide was being admitted. During his final charge, however, he did explain that the jury was not to consider this evidence for purposes other than establishing motive or rebutting the claim that the shooting of Officer Miller was accidental.

IV. Exhaustion

A habeas corpus petitioner must exhaust available state remedies before the federal court may entertain his petition for habeas corpus relief. Vasquez v. Hillery, 474 U.S. 254 (1986); Picard v. Connor, 404 U.S. 270 (1971); 28 U.S.C. § 2254(b) and (c). Principles of comity and deference underlie the exhaustion requirement, which assures that the state courts will have the first opportunity to address the habeas petitioner's claims, without interference from the federal judiciary. Wilwording v. Swenson, 404 U.S. 249 (1971); Fay v. Noia, 372 U.S. 391 (1963). In addition, there are practical reasons for requiring that federal issues first be presented to the state courts. The requirement "affords the parties the opportunity to develop the record necessary for adjudicating the issue [and] insures that if there are independent and ade-

quate state grounds that would permit the federal issue they will be identified and acted upon in an authoritative manner." Webb v. Webb, 451 U.S. 493, 500 (1981).

The Commonwealth states that the petitioner has satisfied the exhaustion requirement by presenting to the state courts the numerous claims contained in his petition at one point or another in the post-trial and appellate process. A concession by the state's counsel, however, is insufficient in itself to dispose of the exhaustion issue; rather, an "independent judicial inquiry" is required. Zicarelli v. Gray, 543 F.2d 466, 471 (3d Cir. 1976); see also Brown v. Fauver, 819 F.2d 395 (3d Cir. 1987).

The exhaustion requirement is satisfied once the federal claim has been "fairly presented" to the state courts. Picard v. Conno, 404 U.S. at 275. In

order to be fairly presented, the claim raised in the habeas proceeding must have rested upon the same legal and factual bases in the state court, Hill v. Zimmerman, 709 F.2d 232 (3d Cir.), cert. denied, 464 U.S. 940 (1983); that is, the same method of analysis must have been presented to the state and federal courts. Chaussard v. Fulcomer, 816 F.2d 925 (3d Cir.), cert. denied, ___ U.S. _____, 108 S.Ct. 139 (1987); Zicarelli v. Gray, 543 F.2d 466 (3d Cir. 1976).

On direct appeal from the judgment of conviction, the petitioner argued that the introduction of evidence of the Nichols' homicide was error justifying the grant of a new trial. The legal basis of this argument was not the Fourteenth Amendment's due process clause, however; the argument presented to the Pennsylvania courts rested upon prin-

ciples of state evidentiary law. The briefs presented to the state courts in post-conviction proceedings addressed the evidence of the Nichols' killing, but only in the context of an argument concerning the claimed failure of the Pennsylvania Supreme Court, on direct appeal, to give petitioner the proportionality review required by the Pennsylvania death penalty statute, 42 Pa.C.S.A. § 9711(h)(3)(iii). Due process issues were not raised. In short, while the state courts have been presented with an opportunity to address the prejudicial effect of the admission of the evidence, the issue has not been phrased in terms of due process concerns prior to the filing of the instant habeas petition.

Despite this fact, the requirements of exhaustion doctrine have been satisfied. Inasmuch as the legal standards

employed to evaluate a due process claim arising out of the admission of prior crimes evidence are essentially identical to those applied by the Pennsylvania Supreme Court in its evaluation of petitioner's claim on direct appeal, the purposes which exhaustion is designed to serve has been met. Due process analysis, when applied in the context of claimed error arising from evidentiary rulings, requires as assessment of the prejudicial effect of the evidence in the context of its probative value. See, e.g., Osborne v. Wainwright, 720 F.2d 1237 (11th Cir. 1983); Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981); United States ex rel Lowry v. Myers, 364 F.2d 297 (3d Cir. 1966). This process parallels the analysis employed the the Pennsylvania Supreme Court, in its evaluation of the evidentiary question at hand. Common-

wealth v. Travaglia, 502 Pa. 474, 467 A.2d 288, 296-98 (1983). Moreover, an argument that highly prejudicial evidence was erroneously admitted in effect subsumes the claim that a fair trial has been denied. It is unrealistic to assume that, had the issue been framed in terms of the process due a defendant under the Fourteenth Amendment rather than under state evidentiary law, the outcome of the Pennsylvania courts' analysis would have been different.

In addition, there are no "unresolved questions of fact or of state law" which would bear upon the issue presented.[2] Granberry v. Greer, ___ U.S

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[2]The question of prejudice under the Fourteenth Amendment is one of law and not of fact; therefore, the state courts' findings on this issue are not binding on this court. Brewer v. Williams, 430 U.S. 387 (1977); Panzavecchia v. Wainwright, 658 F.2d 337, 339 (5th Cir. 1981).

____, 107 S.Ct. 1671, 1675 (1987); Reynolds v. Ellingsworth, No. 86-5633, slip op. at 28, n.23 (3d Cir. March 31, 1988). No independent and adequate state grounds are presented which would eliminate the need to address petitioner's due process claim. Webb v. Webb, supra. Given the fact that this is a capital case and, therefore, a greater degree of scrutiny is appropriate, United States ex rel Scoleri v. Banmiller, 310 F.2d 720 (3d Cir. 1962), cert. denied, 374 U.S. 828 (1963), the merits of petitioner's argument will be addressed

V. Due Process

The aim of the requirement of due process is to prevent fundamental unfairness in the use of evidence, whether true or false. Colorado v. Connelly, ___ U.S. ____, 107 S.Ct. 515 (1986); Lisenba v. California, 314 U.S.

219, 236 (1941). The function of a district court on habeas review, however, is not to determine whether evidence has been admitted in violation of applicable state rules. United States ex rel Mertz v. New Jersey, 423 F.2d 537 (3d Cir. 1970). Evidentiary errors during a state criminal trial are not subject to review in a habeas corpus proceeding unless it is shown that the error was so "conspicuously prejudicial" as to deprive the petitioner of a fair trial. United States ex rel Abdus-Sabur v. Cuyler, 653 F.2d 828, 833 (3d Cir.), cert. denied, 454 U.S. 1088 (1981); United States ex rel Cannon v. Maroney, 373 F.2d 908 (3d Cir. 1967).

As a general rule, evidence of prior criminal conduct is inadmissible in a criminal case, since it creates a great degree of risk that the factfinder will take it as demonstrating a defendant's

propensity to commit unlawful acts, thus increasing the likelihood that he is guilty of the offense with which he is charged in the pending prosecution. United States ex rel Choice v. Brierley, 460 F.2d 68 (3d Cir. 1972). The rule, however, is subject to exception; evidence of prior criminal activity may be admissible if probative of the issues of motive, identity, or a system or plan of criminal activity. Spencer v. Texas, 385 U.S. 554, 560 (1976).

Difficulty inevitably arises in the application of the rule. "What may not be admissible in one situation may well be admissible in another." Brierley, supra, at 71. "The wiser opinions...recognize that the problem is...one of balancing, on the one side, the actual need for the other-crimes evidence...and on the other, the degree to which the jury will probably be

roused by the evidence to overmastering hostility [toward the defendant]." McCormick, The Law of Evidence (2d ed.) § 190.

Where the evidence presented is purely documentary, such as where the jury is simply informed of the fact of the defendant's previous convictions, the potential for prejudice is relatively slight; the jury is not presented with detailed information concerning the nature of the previous crimes and, therefore, whatever prejudice is engendered may be sufficiently counterbalanced by limiting instructions provided by the court. Under such circumstances, due process is not likely to be violated. See, e.g., Spencer v. Texas, supra (holding that admission of the defendant's criminal history under a state recidivist statute does not run afoul of the Fourteenth Amendment because "the

evidence is...almost always of a purely documentary kind, and in [the case at hand] there is no claim that its presentation was in any way inflammatory." 385 U.S. at 526). Cf. United States ex rel Lowry v. Myers, 364 F.2d 297 (3d Cir. 1966); United States ex rel Scoleri v. Banmiller, 310 F.2d 720 (3d Cir. 1962), cert. denied, 374 U.S. 828 (1963).[3]

A review of the factual circumstances of other cases holding the admission of the other-crimes evidence unconstitutional would serve little pur-

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[3]At least one circuit has determined that the admission of purely documentary evidence on occasion may rise to the level of a due process violation. In Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981), the Court held that the admission of defendant's conviction for counterfeiting, during a murder prosecution, deprived him of the "fundamental fairness" guaranteed by the Fourteenth Amendment.

pose. Questions of prejudice and fairness necessarily turn upon the circumstances of the particular case; reasonable minds may differ over the degree of prejudice generated. The Court is aware that state court determinations concerning admissibility of such evidence should be rejected "only in the clearest of cases of gross and easily avoided prejudice." United States ex rel Rucker v. Myers, 311 F.2d 311, 315 (3d Cir. 1962), cert. denied, 374 U.S. 844 (1963). Unfortunately, we are convinced that this is such a case.

The trial judge, in evaluating the probative value of Ricky Rutherford's testimony concerning Nichols' death, determined that it was relevant to the issues of motive, presumably for the reason that at the time the defendants were stopped by officer Miller, they were traveling in Nichols' car, which

contained his personal identification. The killing of Officer Miller thus could be seen to be consistent with an attempt to avoid apprehension for the prior crime. The trial judge also ruled that the evidence of Nichols' death was relevant to the degree of murder in the Miller prosecution.

Had the trial court limited the testimony of Rutherford, as requested by petitioner's counsel, excluding the details of the torture-murder of Nichols, this Court would be unwilling to conclude that a fair trial had been denied. The purposes for which the trial judge ruled the evidence admissible would have been fully served had the jury simply been presented with fact that another murder had been committed earlier in the morning of January 3, 1980, and that the car in which the defendants were traveling at the time of

the Miller homicide belonged to that murder victim.

The jury, of course, heard the testimony concerning Officer Miller's death, which testimony could not have failed to have an emotional impact. The circumstances of his death, however, were obviously relevant and, while certainly tragic, by no means were as likely to inflame the jury as the detailed recitation of the torture, intimidation and humiliation which petitioner and his co-defendant forced Nichols to endure.

The trial judge gave a limiting instruction concerning the evidence of Nichols' murder at the close of the case, more than a week following Rutherford's testimony. The jury was instructed that they were not to consider the testimony for any purposes other than motive or to rebut Travaglia's claim that the shooting of Miller was

accidental. For a jury to so limit their consideration, however, would require "a feat of psychological wizardry verg[ing] on the impossible even for berobed judges." United States ex rel Scoleri v. Banmiller, 310 F.2d 720, 725 (3d Cir. 1962). See also United States ex rel Rucker v. Myers, supra, at 315. The judge's instruction could not have remedied the prejudice created by the admission of this evidence.

In summary, the prejudicial effect of the detailed testimony concerning Nichols' death was enormous and easily could have been avoided. Its probative value was non-existent. The jury's deliberations concerning guilt and later, punishment, could not have failed to be affected in some significant measure by Rutherford's testimony regarding the earlier murder. The Court has no

hesitation concluding that petitioner was deprived of his constitutionally guaranteed right to a fair trial.

This conclusion does not end the Court's inquiry, however. Not every constitutional violation necessarily results in the grant of a writ of habeas corpus. Bisaccia v. Attorney General of the State of New Jersey, 623 F.2d 307 (3d Cir.), cert. denied, 449 U.S. 1042 (1980). Due process violations are subject to a harmless error analysis; the Court must determine whether there is a "reasonable possibility that the evidence complained of might have contributed to the conviction." Chapman v. California, 386 U.S. 18, 24 (1967); Fahy v. Connecticut, 375 U.S. 85 (1963).

Application of the harmless error doctrine requires the district court to be able to declare a belief that the constitutional error was harmless beyond

a reasonable doubt. Chapman, supra; United States v. Scarfo, 685 F.2d 842 (3d Cir. 1982), cert. denied, 459 U.S. 1170 (1983). This inquiry compels an examination of the importance of the erroneously admitted evidence in the context of the trial as a whole. United States v. Schaefer, 691 F.2d 639, 646 (3d Cir. 1982).

Applying these principles to the instant case, the Court concludes that the evidence of petitioner's guilt was so overwhelming that, even given the highly inflammatory nature of the testimony concerning Nichols' death, the jury could not have failed to return a verdict of guilt. In addition to testimony tying petitioner to the Nichols' vehicle, and tying the Nichols' vehicle to the scene of the Miller homicide, petitioner's statement was admitted into evidence. The statement contained the

admission that petitioner was present in the vehicle at the time Travaglia fired on the police officer. In addition, Travaglia's inculpatory statement was admitted. Finally, the statements of the petitioner and Travaglia are consistent with the testimony of Rutherford, who was an eyewitness to Officer Miller's death.

Despite the foregoing, however, the Court is unable to conclude beyond a reasonable doubt that the admission of the evidence of Nichols' death played no role in the jury's determinations, specifically those concerning the degree of homicide for which petitioner was to be found guilty. The jury was instructed on first, second and third degree murder, as well as manslaughter. Particularly given the fact that petitioner was charged only as an accomplice, and clearly was not the principal actor in

the crime, it cannot be said with certainty that the jury only could have returned the verdict of first degree murder which it did. Only a verdict of first degree murder carries with it the possible penalty of death. 42 Pa.C.S.A. § 9711.

Moreover, even assuming arguendo that the first degree murder conviction was inevitable, this Court cannot conclude beyond a reasonable doubt that the testimony concerning Nichols' death did not sway the jury, during the penalty phase, to return a sentence of death rather than one of life imprisonment.

The Fourteenth Amendment guarantees the right of a fundamentally fair trial to the guilty and the innocent alike. Where a sentence of death has been imposed and it cannot be said beyond a reasonable doubt that erroneously admitted, highly prejudicial testimony played

no role in the decision to impose such a grave penalty, the Constitution requires that petitioner be granted the requested relief.[4]

An appropriate Order will be issued.

/s/ Alan M. Bloch
United States District Judge

Date: 5/2/88

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[4]The grant of the writ of habeas corpus does not give rise to double jeopardy concerns. Reversal of a conviction for trial error does not bar retrial under the Fifth Amendment, since it implies nothing with respect to the guilt or innocence of the defendant or the strength of the government's case. Burks v. United States, 437 U.S. 1, 15 (1978); Vogel v. Pennsylvania, 790 F.2d 368, 370 (3d Cir. 1986); Commonwealth v. Vogel, 501 Pa. 314, 461 A.2d 604 (1983), cert. denied, 465 U.S. 1104 (1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 86-1238

JOHN CHARLES LESKO,
Petitioner

v.

GLEN R. JEFFES, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional institution at Rockview; HENRY G. BARR, General Counsel of Pennsylvania; and LEROY ZIMMERMAN, Attorney General of the Commonwealth of Pennsylvania,
Respondents

O R D E R

AND NOW, this 2nd day of May, 1988, having found that the Commonwealth of Pennsylvania holds John Charles Lesko in custody in violation of the Constitution of the United States.

IT IS HEREBY ORDERED that a writ of habeas corpus shall issue discharging the petitioner from custody imposed pursuant to his conviction and sentence in the Court of Common Pleas of Westmoreland County, Pennsylvania, At No. 681 C of 1980, unless the Commonwealth retries the petitioner within 180 days of this date.

/s/ Alan M. Bloch
United States District Judge

APPENDIX G

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 723 PITTSBURGH 1985

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN C. LESKO
Appellant

Appeal from the Order entered May 7, 1985 in the Court of Common Pleas of Indiana County, Criminal No. 35 Crim. 1980.

BEFORE: DEL SOLE, MONTGOMERY AND LIPEZ, JJ.

PER CURIAM: FILED: JUNE 23, 1986

Appeal Quashed.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 723 PITTSBURGH 1985

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN C. LESKO
Appellant

Appeal from the Order entered May 7, 1985 in the Court of Common Pleas of Indiana County, Criminal No. 35 Crim. 1980.

BEFORE: DEL SOLE, MONTGOMERY AND LIPEZ, JJ.

MEMORANDUM:

Appellant, John Charles Lesko, pled guilty to murder in the second degree on May 19, 1980, and was subsequently sentenced to life imprisonment. From the Indiana County Court of Common Pleas' denial of his petition to withdraw the guilty plea a direct appeal was taken to this court which subse-

quently transferred the matter sua sponte to the Pennsylvania Supreme Court. For the sake of judicial ecomony, our Supreme Court also assumed jurisdiction of Appellant's claim of ineffectiveness of counsel which was raised for the first time on appeal. Having determined that remanding for an evidentiary hearing would not be of assistance, Appellant's claims were considered and the judgment of sentence was affirmed. See: Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1982).

Appellant then filed a pro se petition under the Post Conviction Hearing act on April 15, 1985, alleging ineffectiveness of counsel. The essence of Appellant's claim is that counsel miscommunicated the terms of the plea agreement entered into between the Commonwealth and himself. By order dated April 19, 1985, filed April 23,

1985, the petition was denied without appointment of counsel or hearing. On May 6, 1985, Appellant filed a motion for reconsideration of the Order Denying the Post Conviction Hearing Act petition and additionally filed a motion for notes of trial testimony and other court records. These motions were denied by Order dated and filed May 7, 1985. On May 31, 1985, Appellant filed a notice of appeal from the May 7, 1985 order and by order filed June 11, 1985, present counsel was appointed to represent Appellant for purposes of this appeal.

We quash this appeal as having been untimely filed. "Where an appeal has been filed untimely, the defect is jurisdictional and may be raised by this Court sua sponte."[1] Commonwealth

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[1]The Commonwealth has failed to file a Brief in this matter without explanation.

v. Williams, 313 Pa.Super. 81, 82, 459 A.2d 420, 421 (1983). "The notice of appeal 'shall be filed within 30 days after the entry of the order from which the appeal is taken.' Pa.R.A.P. 903(a)" Commonwealth v. Fisher, 321 Pa.Super. 534, 535, 468 A.2d 1117, 1118 (1983). Although Appellant filed the notice of appeal pro se, this does not alter the result. Id. at 536 n.1, 468 A.2d at 1118 n.1. "Moreover, and in any event, an appeal will lie only from a definitive order, decree or judgment which finally terminates the action." Commonwealth v. Williams, supra, 313 Pa.Super at 83, 459 A.2d at 421. "[W]hile it is procedurally permissible for a party to appeal a lower court's order and at the same time request the lower court itself to reconsider such order, Pa.R.A.P. 1701, a subsequent denial of reconsideration by the lower

court is not an appealable order." Dillon by Dillon v. Nat. R.R. Corp., 345 Pa.Super. 126, 130, 497 A.2d 1336, 1337 (1985). "Only where then the lower tribunal affirmatively and timely grants reconsideration is the appeal period tolled. See Pa.R.A.P. 1701(b). If reconsideration is timely granted, the appeal period begins to run anew from the decision on reconsideration. See: Pa.R.A.P. 1701(b)(3)." Lee v. Zoning Bd. of Adjust. of Philadelphia, ___ Pa.Cmwlth. ____, ____, 496 A.2d 885, 887 (1985). "Appellant's attempt to challenge the trial court's refusal of his petition for reconsideration is improper." Seibel v. Allstate Ins. Co., ___ Pa.Super. ____, ____, 499 A.2d 666, 670 (1985). The order which terminated the action and therefore is the appealable order is that which denied Appellant's Post Conviction

Hearing Act Petition, dated April 19, 1985 and filed April 23, 1985. The notice of appeal, as previously stated, was filed May 31, 1985. "We will not permit appellant to do indirectly that which he cannot do directly." Provident Nat. Bank v. Rooklin, 250 Pa.Super. 194, ____, 378 A.2d 893 (1977). Because this appeal was not timely filed it is hereby quashed.

APPENDIX H

IN THE COURT OF COMMON PLEAS
OF INDIANA COUNTY, PENNSYLVANIA

NO. 35 Crim. 1980

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN CHARLES LESKO

OPINION AND ORDER OF COURT

EARLEY, J.

This matter comes before the Court on the Petition of John Charles Lesko ("Lesko") under the Post Conviction Hearing Act ("PCHA").

This Court has determined that Mr. Lesko's petition is denied without a hearing.

DISCUSSION

Mr. Lesko's basis for this petition is ineffectiveness of counsel specifi-

cally, Lesko claims that his trial counsel miscommunicated the terms of the plea agreement entered into between the Commonwealth and himself.

On May 19, 1980, when Lesko plead guilty to a charge of murder in the second degree, the Commonwealth agreed to dismiss the other charges filed against him and not to pursue sentencing of Mr. Lesko until after June 2, 1980 or later. It was cousel's strategy that by delaying sentencing in that manner the guilty plea in this Court would not be considered an aggravating circumstance for purposes of a murder trial in Westmoreland County. At the time when the Court accepted Mr. Lesko's plea, it was made certain that he understood the agreement and entered into it willingly.

The Pennsylvania Supreme Court has previously ruled that counsel's decision to seek a delay in sentencing was

neither unreasonable nor ineffective, that there was no breach of the plea agreement by the Commonwealth, and that defendant understood the exact nature of the agreement. Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1983). Under the PCHA, the issues raised now by Mr. Lesko's petition are considered finally litigated. 42 Pa.C.S.A. § 9544(a)(3). Moreover, a petitioner cannot seek further review through PCHA proceedings where a court considered and rejected his claim on direct appeal. Commonwealth v. McKenna, 498 Pa. 416, 446 A.2d 1274.

This Court has no alternative but to deny Mr. Lesko's petition without a hearing based on the above cited authority.

WHEREFORE, the Court makes the following Order:

IN THE COURT OF COMMON PLEAS
OF INDIANA COUNTY, PENNSYLVANIA

NO. 35 Crim. 1980

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN CHARLES LESKO

ORDER OF COURT

EARLEY, J.

AND NOW, April 19, 1985, the Petition for Post Conviction Hearing is denied without a hearing.

BY THE COURT,

/s/ Robert C. Earley
President Judge

APPENDIX I

COMMONWEALTH of Pennsylvania

v.

John Charles LESKO, Appellant.

Supreme Court of Pennsylvania.

April 2, 1986.

Application No. 42 W.D. Appeal Dkt. 1985 for Reargument.

Prior report: 509 Pa.67, 501 A.2d 200.

ORDER

PER CURIAM.

The Application for Reargument is denied.

The matters raised by appellant as pending before the United States Supreme Court have already been fully considered by this Court, either during appellant's direct appeal or his post conviction proceeding.

With respect to counsel's contention that this Court considered matters outside the record in determining the

"appropriateness or proportionality" of the death sentence, we first remind counsel that the transcript of the trial is not the whole record. Our present recitation of the facts, which does not differ from the statement by this Court on direct appeal, was drawn from the record and presented to provide a complete picture of the events which occurred. See Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1983).

Moreover, the facts taken from the suppression record were not and could not be considered by us in dealing with the proportionality issue. In considering the proportionality of appellant's sentence, this Court looked only at the mitigating and aggravating circumstances which were considered by the jury in reaching its decision. These factors, all of which were part of the trial

transcript, were sufficient for us to determine that appellant's sentence was not disproportionate to the penalty imposed in similar cases. See Commonwealth v. Travaglia, 502 Pa. at 504-05, 467 Pa. at 303-04.

FLAHERTY, J., did not participate in the consideration or decision of this case.

APPENDIX J

COMMONWEALTH of Pennsylvania, Appellee,

v.

John Charles LESKO, Appellant,

Supreme Court of Pennsylvania.

Argued Sept. 16, 1985.

Decided Nov. 12, 1985.

Before NIX, C.J., and LARSEN, McDERMOTT, ZAPPALA and PAPADAKOS, JJ.

OPINION OF THE COURT

HUTCHINSON, Justice.

John Charles Lesko, appellant, appealed to us a Westmoreland County Common Pleas order denying his petition for post-conviction relief from that court's death sentence without a hearing. After filing his appeal in this Court, he asked us to transfer the record to Superior Court, claiming that we lacked initial appellate jurisdiction over post-conviction appeals in capital cases. On the merits, asserting breach of a plea bargain, he contends Westmore-

land County Common Pleas erred in holding that his right to withdraw his guilty plea to a related murder had been finally determined against him by us in Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1982), on direct appeal from the Court of Common Pleas of Indiana County, the court with initial jurisdiction over that related murder. He also contends that he has been denied adequate appellate review on the proportionality of his sentence and that the trial judge's instructions to the Westmoreland County sentencing jury not to be swayed by sympathy for either his victim or appellant himself violated the requirement of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1977), that an "individualized decision is essential in capital cases" because "the uniqueness of the individual is far more important than in non-capital

cases." 438 U.S. 586, 605, 98 S.Ct. 2954, 2965.

We now hold that under the present version of our Post-Conviction Hearing Act, Act of May 13, 1982, P.L. 417, 42 Pa.C.S. § 9541-9551, appeals of Common Pleas decisions are within Superior Court's jurisdiction, and that this method of appeal is not in conflict with either Section 722 of the Judicial Code, 42 Pa.C.S. § 722, relating to our jurisdiction on direct appeals from Common Pleas, or Section 9711(h) of the Sentencing Code, 42 Pa.C.S. § 9711(h), relating to our automatic review of death sentences. Nevertheless, because of the uncertainty surrounding this jurisdictional issue of first impression, its importance in the administration of our death penalty act and the uncertainties further delay would impose in this case, we will accept appellant's appeal and,

instead of transferring it to Superior Court pursuant to 42 Pa.C.S. § 5103(a), retain jurisdiction here under 42 Pa. C.S. § 726. Since we have already decided all the issues raised in this collateral proceeding against appellant in either his direct appeal from his Westmoreland County conviction and sentence[1] or his appeal from the Indiana County Common Pleas' denial of his petition to withdraw his guilty plea to the murder of William Nicholls[2] and no extraordinary circumstances have been averred or found by us, the issues appellant raises on this appeal are unavailable to him as grounds for post-

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[1]Appellant's direct appeal was consolidated with that of his co-defendant and is reported at Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1982).

[2]See Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1982).

conviction relief under Section 9544 of the Post-Conviction Hearing Act, 42 Pa. C.S. § 9544. We therefore rule against him on the merits. Having so ruled, and having thoroughly reviewed all aspects of the record relating to his conviction and sentence in his direct appeals, we affirm Common Pleas.

After a Westmoreland County jury found appellant guilty of murder in the first degree in the ambush killing of police officer Leonard Miller, the Commonwealth called the District Attorney of Indiana County as a witness in the sentencing phase to show that appellant had entered a guilty plea to second degree murder in Indiana County Common Pleas to the killing of William Nicholls in that county after Nicholls had been abducted and robbed. This testimony was presented to establish one of the aggravating circumstances which our death

penalty statute permits a jury to consider in deciding whether a person which it has found guilty of first degree murder should be sentenced to death or life imprisonment. The particular aggravating circumstance as to which appellant's Indiana County plea was relevant is Section 9711(d)(10) of the Sentencing Code, 42 Pa.C.S. § 9711(d)(10), a conviction of "another . . . offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was impossible . . . ." Murder in the second degree, felony murder, here based on the robbery of Nicholls, is a crime for which a sentence of life imprisonment is mandatory. Section 1102 of the Crimes Code, 18 Pa.C.S. § 1102. The record in the guilt phase of appellant's trial for the killing of Miller in Westmoreland County shows, independently of

the testimony of the Indiana District Attorney and the records he identified at the sentencing phase, that appellant and others had abducted Nicholls in Nicholl's own car in Allegheny County and forced him to drive with them out of town, after appellant's Westmoreland County co-defendant, Michael Travaglia, had shot Nicholls in the arm. Abusing Nicholls along the way, they went to a lake in Indiana County, where they bound and gagged Nicholls and weighted him with rocks. So trussed and weighted, they carried him to the lake, broke the ice on it and threw him into water over his head. Still in Nicholls's car, with his belongings and a gun which connected them to another killing which occurred within a week of the killings of Nicholls and Miller and to a series of robberies of convenience stores in Indiana and Westmoreland Counties within

the same time frame, appellant and his accomplice encountered Officer miller enticed him into a chase, pulled over and killed him as he approached their stopped vehicle.

This Court provided appellant with the automatic review which the law requires us in capital cases in his direct appeal from his conviction and death sentence in the killing of Officer Miller. That review is mandatory under Section 9711(h) of the Sentencing Code, 42 Pa.C.S. § 9711(h).[3]

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[3]The Sentencing Code provides in pertinent part:

(h) Review of death sentence.-

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the

(footnote continued on next page)

The jurisdictional basis for the automatic review required by Section 9711(h) of the Sentencing Code is provided by Section 722(4) of the Judicial Code, 42 Pa.C.S. § 722(4).Section 722 gives this Court "exclusive jurisdiction of appeals from final orders of the courts of common pleas" in certain specified classes of cases. Subsection (4) includes in those classes "[a]auto-

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[3](continued) imposition of a life imprisonment sentence.

> (3) The Supreme Court shall affirm the sentence of death unless it determines that:
> (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
> (ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or
> (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

42 Pa.C.S. § 9711(h).

matic review of sentences as provided by 42 Pa.C.S. § 9711(h) (relating to review of death sentence)."

Prior to the Act of September 23, 1980, P.L. 686, No. 137, § 1, effective November 22, 1980 (Act 137 of 1980), Section 722 of the Judicial Code included among the classes of cases within our exclusive jurisdiction, under the former version of its subsection (1), "Felonious homicide."

In Commonwealth v. Fauntroy, 475 Pa. 287, 380 A.2d 357 (1977), we had interpreted Section 202 of our repealed Appellate Court Jurisdiction Act,[4] which was identical in language with the former version of Section 722(1) of the Judicial Code, as giving us exclusive jurisdiction not only of direct appeals

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[4]Act of July 31, 1970, P.L. 673, art. II, § 202, formerly 17 P.S. § 211.202.

in cases of felonious homicide, but also of appeals in post-conviction proceedings concerning them.

However, Section 722(1) of the Judicial Code now grants us exclusive jurisdiction only over "matters prescribed by general rule." Judicial power over collateral post-conviction review of criminal proceedings was specifically granted by the legislature under the Act of December 20, 1982, P.L. 1409, No. 326, Art II, § 201, effective February 18, 1983; 42 Pa.C.S. § 9501. It provides:

> § 9501. Procedures, motions and other matters.
>
> Except as otherwise provided by this chapter all post-trial procedures, motions and other matters relating to any criminal proceeding shall be conducted in the manner, at the times, on the terms and conditions and in the form prescribed by general rules.

Rules implementing this statute have been adopted as Chapter 1500 of our Rules of Criminal Procedure, Pa.R. Crim.P. 1501-1507. Rule 1507 expressly suspends the Post-Conviction Hearing Act of 1982, 42 Pa.C.S. § 9541-9551, insofar as it is inconsistent with the rules. Neither the rules themselves nor the 1982 Post-Conviction Hearing Act expressly provide for appellate jurisdiction.

However, Section 742 of the Judicial Code, 42 Pa.C.S. § 742, relating to appeals from courts of common pleas in cases not entrusted to us provides:

> § 742. Appeals from courts of common pleas.
>
> The Superior Court shall have exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas, regardless of the nature of the controversy or the amount involved, except such classes of appeals as are by any provision of this chapter within the exclusive jurisdiction of the Supreme Court or the Commonwealth Court.

Act No. 137 of 1980, which amended Section 722 of the Judicial Code into its present form, had as a prime purpose relieving this Court of the burden of dealing with all appeals in cases of felonious homicide, including the repeated appeals such cases of often generated under the Post-Conviction Hearing Act and converted this Court into one with primarily discretionary appellate jurisdiction. It had as its prime mover former Chief Justice Michael Eagan, who labored intensely in educating the bar, the public and the legislature on the adverse effect the burden of often frivolous appeals and reappeals was having on our ability to discharge our administrative and supervisory powers as governing authority of the unified judicial system, along with our rule making function and our prime judicial duty of clearly and carefully delineating the

law of this Commonwealth in areas of general import in which its meaning or application was in dispute. Recognizing the increased burden the removal of these and other matters from our jurisdiction would have on Superior Court, the legislature had passed the Act of June 11, 1980, P.L. 213, No. 63, 42 Pa.C.S. § 541, increasing the size of Superior Court from seven to fifteen members. In Act 137, the legislature was also careful to rewrite Section 722(4) of the Judicial Code to insure by explicit requirement that an automatic, searching and independent review of all death sentences would be available in this Court on a mandatory basis, in accordance with Section 9711(h) of the Sentencing Code. As stated, this appellant has had such a review.

For us to conclude that either this appellant, others sentenced to death or

the Commonwealth itself have a right to appeal to us final orders of the courts of common pleas in collateral attacks on death sentences by postconviction proceedings would not, to our mind, further the legislative purpose in passing the 1980 amendments to both the Judicial Code and the Post-Conviction Hearing Act. The development of any issues appropriately raised on collateral attack is, we believe, better left to the normal appellate process under Section 742 of the Judicial Code. In that manner, attempts to relitigate questions we have already decided can be screened and new or unseen issues not finally litigated or waived fully explored. When such new issues arise, which should rarely occur because of the broad and searching review we make on direct appeal, they can be considered in this Court on petition of either party,

addressed to our discretionary jurisdiction under Section 724 of the Judicial Code. Thus, any significant issue of statewide import can be fully considered here on a discretionary basis. The remedies available under the Post-Conviction Hearing Act are derivative of those available under the ancient writ of habeas corpus. That writ was always available in the lower courts. We therefore see no anomaly in permitting them to consider, in the first instance, whether collateral relief is available under Section 9543 of the Post-Conviction Hearing Act, 42 Pa.C.S. § 9543.[5] Those few capital cases which involve issues which we have not considered and which, therefore, remain open under the Act, are subject to the

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[5]Section 9543 sets forth the substantive basis for post-conviction relief.

normal process of full appellate review in Superior Court and discretionary review here.

Considering the legislative history and purpose behind Act. No. 137 of 1980, which included the amendment to Section 722 of the Judicial Code deleting the category of felonious homicides from our exclusive appellate jurisdiction, and the fact that we have not utilized the present version of § 722(1) to adopt a general rule providing for our exclusive jurisdiction in collateral attacks on death sentences, we conclude that they are not normally within it, but instead encompassed within the appellate jurisdiction of Superior Court under Section 742 of the Judicial Code, as appeals "from final orders of the courts of common pleas,. . . [not] within the exclusive [appellate] jurisdiction of the Supreme Court or the Commonwealth Court."

However, because the appropriate resolution of this appellate jurisdiction issue is a matter of first impression which was not free of doubt, appellant's initial action in filing his appeal from the denial of post-conviction relief with us was not unreasonable. In dealing with it, we have had the benefit of full briefing and argument on the issues he raises on the merits. Therefore, in this particular case, it seems to us that a transfer back to Superior Court without a decision on the merits would be a wasteful use of judicial resources and only serve to prolong the cruel apprehension which the repeated appeals and delays of our legal system imposes. Both the convicted murderer and society have a right to a thoughtful, but reasonably prompt, disposition of these cases. With those thoughts in mind, exercising the power

the legislature has given us in Section 726 of the Judicial Code, we deny appellant's application to transfer this particular case.

Proceeding to a consideration of the merits of this appeal, we agree with the Westmoreland County Court of Common Pleas that appellant's petition for post-conviction relief must be denied. Our Post-Conviction Hearing Act provides: "To be eligible for relief under [it], a person . . . must prove . . . (4) That the error resulting in his conviction and sentence has not been finally litigated or waived." 42 Pa. C.S. § 9543(4).

With respect to hearings, it specifically states:

> § 9549. Hearing on petition.
>
> . . .
>
> (b) When not required.-The court may deny a hearing if the petitioner's claim is patently frivolous and is without a trace

> of support either in the record or from other evidence submitted by the petitioner. The court may also deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held at the original trial or at any later proceeding.

42 Pa.C.S. § 9549(b).[6] The Post-Conviction Hearing Act further provides:". . . an issue is finally litigated if: . . . (3) The Supreme Court has ruled on the merits of the issue." 42 Pa.C.S. § 9544(a)(3). We have so ruled on two of the three issues raised by appellant. The remaining issue, involving Lockett v. Ohio, supra, if not finally determined, was waived under Section 9544(b) of the Post-Conviction Hearing Act, 42 Pa.C.S. § 9544(b).

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[6]Pa.R.Crim.P. 1504, relating to summary dispositions without the appointment of counsel is consonant with this section.

In Commonwealth v. Travaglia, 502 Pa. 474, 503, 467 A.2d 288, 303 (1983), we addressed the proportionality issue as required by our death penalty statute, Section 9711(h)(3)(iii) of the Sentencing Code, 42 Pa.C.S. § 9711(h)(3)(iii), and expressly held the imposition of the death sentence upon appellant was not excessive or disproportionate. In that connection, we said:

> We have searched the records of these cases available to this Court for information as to the character of the defendants (e.g. intelligence, family background, psychiatric history, previous criminal record), and the circumstances, both aggravating and mitigating, of their crimes. We find that the sentence of death is not excessive or disproportionate to the penalty imposed in these similar cases.

502 Pa. at 505, 467 A.2d at 304.

Appellant attempts to avoid this holding with the argument that we failed to consider the fact that his co-defen-

dant, Travaglia, was the trigger man in the killing of Officer Miller and that the imposition of a death sentence on appellant, as a mere accomplice, would be disproportionate. This is merely a different way of raising the proportionality issue. As such, it does not avoid our final holding that the death penalty imposed on him was neither "excessive or disproportionate." See Commonwealth v. Wilson, 452 Pa. 376, 305 A.2d 9 (1973). Besides, his argument implies that imposition of a death sentence on the killer precludes the imposition of the same penalty on any of his accomplices. We have already rejected the argument that a death sentence for a co-defendant who did not do the actual killing is disproportionate when the killer himself received a sentence of imprisonment. Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700 (1984). We would therefore

reject appellant's argument on the proportionality issue even if our holding on direct appeal and the statute itself did not preclude it as a ground for relief in this collateral proceeding.

Appellant's argument that the trial court erred in its instruction to the jury to disregard sympathy[7] was not directly dealt with in our opinion

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[7]The charge in this regard was as follows:

> Now, the verdict is for you, members of the jury. Remember and consider all of the evidence, giving it the weight to which you deem it is entitled. Your decision should not be based on sympathy, because sympathy could improperly sway you into one decision--into a decision imposing the death sentence, or could improperly sway you against the decision of imposing the death sentence. There is sympathy on both sides of that issue. Sympathy is not an aggravating circumstance; it is not a mitigating circumstance.

N.T. January 31, 1981, Sentencing Hearing at 1706.

on his direct appeal.[8] Nevertheless, it was available to him and no extraordinary circumstances are referred to which would justify his not raising it then. See Section 9544(b)(2) of the Post-Conviction Hearing Act, 42 Pa.C.S. § 9544(b)(2); Commonwealth v. Pfaff, 496 Pa. 572, 437 A.2d 1188 (1981). Moreover, Lockett v. Ohio, supra, on which he relies, had already been decided. Therefore, he cannot claim "[t]he abridgement . . . of . . . a right that was not recognized as existing at the

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[8]An analogous issue, raised in connection with his claim of prosecutorial misconduct, was dealth with and rejected when we stated:

> It is clear from reading this argument as a whole that the prosecutor was seeking to remind the jury that sympathy was not a proper consideration, but that if they were inclined to be sympathetic they should temper their sympathy....This was not an improper argument for the prosecutor to have made.

Commonwealth v. Travaglia, 502 Pa. at 501, 467 A.2d at 301.

time of the trial if the constitution requires retrospective application of that right." Section 9543(3)(xii) of the Post-Conviction Hearing Act, 42 Pa.C.S. § 9543(3)(xii). The Act provides in this respect:

> § 9544. When an issue is finally litigated or waived.
>
> . . . .
>
> (b) Issue waived.-For the purposes of this subchapter, an issue is waived if
>
> (1) The petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter.
>
> (2) The petitioner is unable to prove the existence of extraordinary circumstances to justify his failure to raise the issue.
>
> (c) Presumption.-There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

42 Pa.C.S. § 9544(b) and (c). Appellant makes no assertion of ineffectiveness nor of any other extraordinary circumstance which would justify present consideration of this issue. Indeed, counsel at oral argument both here and on direct appeal expressly disclaimed any charge of ineffectiveness. The record indicates such a contention would be difficult to sustain under the standards of ineffectiveness set out either in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), or Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967). See Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1982). We would therefore be justified in holding this issue was waived. However, rather than relying on either waiver or analogy, we will treat it on the merits,

as a new argument. So treated, we reject it for the following reasons.

Read as a whole, the trial judge's charge fully and fairly presented to the jury its duty to consider and weigh the aggravating factors which accompanied this killing against all mitigating factors, including the broad mitigation provision of Section 9711(e) of the Sentencing Code, 42 Pa.C.S. § 9711(e)(8). That section provides that "[m]itigating circumstances shall include the following: . . . (8) [a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S. § 9711(e)(8). This last mitigating factor constituted the legislative response to our decision in Commonwealth v. Moody, 476 Pa.223, 382 A.2d 442 (1977), holding a former version of the death penalty

statute unconstitutional on reasoning analogous to Lockett.

We believe that the presentation of that mitigating factor to the jury as part of the trial judge's charge,[9] satisfies Lockett. We have carefully reviewed the opinions of the California Supreme Court with respect to this issue in People v. Lanphear, 36 Cal.3d 163, 680 P.2d 1081, 203 Cal.Rptr. 122 (1984) and People v. Easley, 34 Cal.3d 858, 671 P.2d 813, 196 Cal.Rptr. 309 (1983), and find them unpersuasive.

Appellant's main argument is that use of his Indiana County guilty plea to second degree murder for the killing of Nicholls as an aggravating circumstances in the killing of Officer Miller violated the plea bargain on which it was

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[9]See N.T. January 31, 1981 Sentencing Hearing at 1704.

based. That issue was also determined adversely to him in his appeal from the denial of his petition to withdraw the Indiana County guilty plea. Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1983). Again, his present argument is a variant on the same issue, as considered in that case. In it, we held that the fact he had not yet been sentenced for the Nicholls murder did not preclude use of his guilty plea as evidence of the aggravating circumstance defined at Section 9711(d)(10) of the Sentencing Code, 42 Pa.C.S. § 9711(d)(10), in the Miller killing and that his counsel was not ineffective in permitting him to enter it. There we said:

> In the lower court opinion, the trial judge found that 'the evidence established: that the defendant entered his plea of guilty to second degree murder upon agreement of the Commonwealth to delay sentenc-

ing as a deliberate choice of trial strategy in an effort to prevent evidence of his criminal acts in Indiana County from being considered as an aggravating circumstance during his first degree murder trial for killing a Westmoreland County police officer.' (R.51). The Appellant agrees with this finding and now argues that his trial counsel was ineffective for persuading him to plead guilty in that trial counsel's conception of the use of this plea in the Westmoreland County case was in error. Because it appears that the action of the Appellant's trial counsel was a calculated attempt to avoid the use of any Indiana County conviction in the Westmoreland County case as an aggravating circumstance, trial counsel cannot be deemed to be ineffective.

. . . .

It was hoped that by following this course, the Westmoreland County judge would disallow the Indiana County guilty plea from being introduced in the penal phase of the trial as an aggravating circumstance, because no sentence had been imposed in Indiana County. However, the Westmoreland County trial judge correctly determined that the plea was admissible. Although trial counsel's strategy failed, he cannot be deemed

> ineffective. Having determine that trial counsel's actions were reasonable and designed to protect the Appellant's interests, it is clear that these actions cannot be deemed ineffective.

502 Pa. at 514-16, 467 A.2d at 308-10 (footnotes omitted).

Appellant now argues that this holding is not a final determination of the issue because he "believed" the terms of the bargain would preclude use of the Nicholls killing as an aggravating circumstance at the sentencing phase of his trial for the murder of Officer Miller. In the words of his counsel at the hearing on the petition to withdraw, he claims there was an "implicit" condition that the plea would not be used against him in the upcoming Westmoreland County trial.

The bargain, which was recorded as part of the transcript on the guilty

plea, includes no such condition.

THE COURT: Now, Mr. Armstrong, has there been a plea bargain in this case?

MR. ARMSTRONG: Yes.

THE COURT: Would you tell me what it is?

MR. ARMSTRONG: Yes. At No. 35, the Commonwealth has agreed to dismiss the complicity charges. And also under #63 Crim. 1980, has agreed to dismiss the robbery and under #64 Crim. 1980, they have agreed to dismiss the robbery charges.

THE COURT: In other words, all of the charges at #63 and #64 Crim. 1980, would be dismissed and the complicity charge at #35 Crim. 1980, would be dismissed upon the [Appellant's] agreement to enter a plea of guilty to murder of the second degree?

MR. ARMSTRONG: Yes. And also that the sentencing would be passed in late June.

THE COURT: And these robbery charges at #63 and #64 Crim. 1980, and the complicity charge at #35 Crim. 1980, would be nol prossed just before sentencing; is that correct?

MR. ARMSTRONG: That is my understanding.

MR. MARTIN: That is correct, your Honor.

BY THE COURT:

Q. All right. Have you understood the conversation between your attorney and the District Attorney and myself?

A. Yes.

Q. In other words, you're promising to enter a plea of guilty to murder of the second degree which carries a penalty of life imprisonment and in exchange to that the Commonwealth agrees to drop all of the charges of #63 Crim. 1980 and #64 Crim. 1980 and also the complicity charge at #35 Crim. 1980, and that would be done at the time of sentencing. And sentencing is not to take place until the end of June or later; is that correct?

MR. ARMSTRONG: We had talked about late June, your Honor, but the date wasn't set.

BY THE COURT:

Q. Do you understand that?

A. Yes.

Q. And is that your understanding of the agreement?

A. Yes.

N.T. May 19, 1980 at 31-33. At sentencing, this bargain was fully kept, as shown by the judgment of sentence.[10]

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[10]At sentencing the court ordered:

> AND NOW, June 22, 1981, the defendant having entered a plea of guilty to the offense of criminal homicide classified as murder in the second degree, the sentence being mandated by statute of life imprisonment, the defendant is sentenced as follows:
>
> That he pay the cost of the prosecution in the amount of two hundred eighty-three dollars and sixty cents ($283.60); that he shall pay a fine to the Commonwealth of Pennsylvania for the use of Indiana County in the amount of one hundred dollars ($100); and that he shall undergo imprisonment for the remainder of his natural life in a state (footnote continued next page)

The guilty plea itself was accompanied by an extensive colloquy at a hearing which required 40 pages to record. In it, the presiding judge painstakingly explained to appellant all of his rights, inquired exhaustively into the factual basis for the plea and the terms of the plea bargain. Nowhere is there any objective hint of an agreement that this plea would not be used in evidence if relevant. Appellant's counsel in those proceedings did not deny this. He said only that such a condi-

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[10](continued) correctional institution. For purposes of this sentence he shall be transported by the Sheriff of Indiana County to the Western Diagnostic and Classification Center located at the State Correctional Institution in Pittsburgh, Pennsylvania.

Credit is to be given to this sentence for any time served by the defendant John Charles Lesko because of this offense.

N.T. June 22, 1981 at 4-5.

tion was "implicit." At the hearing on the petition to withdraw it, the District Attorney expressly denied any such implicit agreement. He said:

> BY MR. MARTIN:
>
> Q. Now, are you familiar with the plea negotiations which took place before and on May 19, 1980?
>
> A. I am.
>
> Q. What is your understanding of that plea arrangement?
>
> A. My understanding of the arrangement is this that the Commonwealth agreed to nol pros a complicity charge, to nol pros the robbery charges in return for a plea of guilty to murder in the second degree. On the day of sentencing Mr. Armstrong approached me and it is my recollection that he asked me if sentencing could be deferred until after the Miller trial in Westmoreland County. I didn't object to that.
>
> Q. Why?
>
> A. There were two reasons. First, I knew that a plea of murder in the second degree would carry a mandatory life sentence and second I knew that Mr. Lesko was incarcerated

awaiting trials in both counties, Indiana and Westmoreland, and I believe that he would remain incarcerated and there wasn't a matter of any consequence to me when he was sentenced in Indiana County since he was going to remain in jail.

. . . .

Q. Now, was there any expressed promise made by your or anyone in the District Attorney's Office that this plea that was entered in Indiana County would not be used in Westmoreland County of any other county?

A. There was no discussion at all concerning the use of this plea in any other county and there was certainly no promise from me whether it would or would not be used.

N.T. April 28, 1981 at 37-38, 39-40. On cross-examination, the Indiana County District Attorney again denied any implicit understanding.

All of appellant's rights were fully protected in connection with the entry of this plea. The record on the petition to withdraw it fully supports the

court's refusal to do so. We affirmed that refusal on direct appeal. The terms of the bargain do not contain the agreement appellant now says he "believed" was "implicit" in it. In this connection, the Indiana County Court of Common Pleas said:

> The defendant's argument that this explicit promise by the Commonwealth carried with it an implied promise of later non-use of the plea in other trials is without merit in view of the fact that if the defendant had intended non-use of his plea to be central to his bargain he would have made it part of the bargain. Commonwealth v. Scott, Pa.Super. [271 Pa.Super. 545] 414 A.2d 388, at 390 (1979); United States v. Miller, 565 F.2d 1273, at 1275 (3rd Cir. 1977).

Common Pleas slip op. at 7-8.

We agree with that statement. Indeed, in dealing with the finality of this issue, we can do no better than to quote the reasons given by Judge Early of the Indiana County Court of Common

Pleas in his opinion denying appellant's petition to withdraw this guilty plea.

> The instant case points to the basic problem of the entire criminal justice system, i.e., the problem that no case is every finally resolved. The liberal allowance of withdrawals of pleas of guilty for less than significant reasons amounting to manifest injustice permits criminal defendants to manipulate the courts at the cost of public trust and great financial expense to the taxpayer. In addition, a plea colloquy adhering to the criteria of our statutes and case law renders the reasons for liberally allowing withdrawal of pleas by defendants nugatory because the very purpose of such plea colloquys is to assure that the defendant enters his plea knowingly, voluntarily, and intelligently. Commonwealth v. Sutton, 474 Pa. 582, 379 A.2d 107 (1977); Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 at 1632 [52 L.Ed.2d 136] (1977).
>
> . . . .
>
> The plea is conducted in open court where the defendant is assisted by his attorney and where the Court conducts an extensive give and take with the defendant, who is under oath,....The defendant is

provided with a detailed explanation of the elements of each crime charged. In addition, he is apprised of his right to file post-trial motions and that his right to appeal will be limited if he enters a plea of guilty. He is asked about any plea bargain, the bargain is reviewed, and the defendant is informed that if a breach of the bargain occurs he may withdraw his plea; he is further informed of the maximum limits of any sentence that may be imposed on him by virtue of his plea regarding incarceration and fines. The defendant is then cautioned to listen to the prosecutions' [sic] factual basis for the charges against him and informed that he may challenge any fact recited by the prosecution that he does not agree with.

In the instant case, the Court complied with all of these criteria and on numerous occasions the [appellant] admitted in open court under oath that he understood that by his plea he was admitting that in the course of a robbery of his victim he intentionally bound the victim, kicked the ice loose from the surface of the dam and tossed in the victim, leaving him to drown. Plea colloquy, at 27, at 32-33, at 34, at 38, at 39-40.

Common Pleas slip op. at 13-15.

Affirmed.

PAPADAKOS, J., files a concurring opinion in which McDERMOTT, J., joins.

FLAHERTY, J., did not participate in the consideration or decision of this case.

PAPADAKOS, Justice, concurring.

I join the the reasoning and mandate of the Majority but write separately to express my belief that appeals of Common Pleas decisions in petitions filed under the Post-Conviction Hearing Act in death penalty cases are within our exclusive jurisdiction as part of the automatic review of death sentences imposed upon us by the legislature in Section 9711(h) of the Sentencing Code, 42 Pa.C.S. § 9711(h).

McDERMOTT, J., joins in this concurring opinion.

PER CURIAM:

AND NOW, this 12th day of November 1985, in view of appellant's right to

file an application for reargument, Pa.R.A.P. 2541, et seq. execution of sentence is stayed pending the filing and consideration of the application for reargument.

APPENDIX K

IN THE COURT OF COMMON PLEAS
WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION
NO. 681 C 1980

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN CHARLES LESKO

OPINION AND ORDER

PROCEDURAL HISTORY:

The above-captioned case comes before this Court on Defendant's Post Conviction Hearing Act Petition. The relief sought in said Petition is "Vacation of Death Sentence."

Defendant was sentenced to death on April 23, 1982. This sentence was automatically appealed to the Pennsylvania Supreme Court in accordance with 42 Pa.C.S.A. 9711(h):

"(h) Review of death sentence. -

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the cir-

> cumstances of the crime and the character and record of the defendant."

The Pennsylvania Supreme Court affirmed the sentence of death. (See Commonwealth v. Travaglia, 502 Pa. 474, 467 A.2d 288 (1983). In view of the allegations in defendant's Post Conviction Petition, it is important to appreciate the type of review conducted by the Pennsylvania Supreme Court. An affirmation of the judgment in the lower court is tantamount to a declaration that the defendant received a fair and error-free trial and that the sentence was not disproportionate or excessive. It is also significant that the decision of the Pennsylvania Supreme Court was appealed to the United States Supreme Court and certiorari was denied.

The defendant in his petition contends that his requested relief

should be granted because of --

> "The abridgment of a right guaranteed by the constitution or laws of this state or by the constitution or laws of the United States, including a right that was not recognized as existing at the time of the trial if the constitution requires retrospective application of that right."
> (Paragraph 4, page 2 of Post Conviction Petition).

In paragraph 5 on pages 3 and 3(a) of said petition, the defendant sets forth the following alleged facts as the basis for his requested relief (these alleged facts will hereinafter be referred to as ISSUES).

> "1. At the conclusion of my penalty trial, the Judge instructed the jury that they should not consider their sympathy for the defendant in deciding whether the death penalty should be imposed. (N.T. 1706).
>
> 2. During my penalty trial, the prosecution introduced evidence of

my guilty plea to second degree murder entered in Indiana County on May 19, 1980. Prior to the entry of that plea I was informed by my attorney, John H. Armstrong, that my plea of guilty would not be admitted at my capital trial in Westmoreland County. The Commonwealth of Pennsylvania reneged on the terms of my plea bargain and thereby violated my due process rights.

3. My rights under the Cruel and Unusual Punishment Clause were violated by the trial Court and each appellate Court thereafter.

4. The Courts have ignored and failed to address my claim that the sentence of death imposed on me was a disproportionate penalty for one found guilty of being an accomplice to a crime committed by another man, where it has not been shown that the

accomplice either intended or caused the death of the victim. My sentence of death has never been reviewed with regard to its disproportionate nature or the fact that it was imposed on the basis of prejudice and inflammatory evidence admitted at the trial in violation of my constitutional rights to a fair trial.

5. The sentence of death imposed on me was a product of passion and prejudice, and this issue has never been addressed by any Court reviewing this case to date.

6. My Constitutional rights have been violated by the refusal of the Courts to provide me with my own transcript of the trial and related proceedings."

In response to defendant's petition, this Court scheduled and held an evi-

dentiary hearing on January 28, 1985.

DISCUSSION AND CONCLUSIONS:

This defendant seeks to have his death sentence vacated through a Post Conviction Hearing Act proceeding. The "Post Conviction Hearing Act" is found in 42 Pa.C.S.A. § 9541 et seq. This legislation defines the permissible issues in a Post Conviction Hearing Act proceeding. The issues that may be considered under this Act are limited to those which have not been finally litigated or waived. Section 2 of said Act (42 Pa.C.S.A. § 9544) excludes issues which have been finally litigated or waived. This Section provides the following:

> "§9544. When an issue is finally litigated or waived
>
> (a) Issues finally litigated.-For the purpose of this subchapter, an issue is finally litigated if:

(1) It has been raised in the trial court, the trial court has ruled on the merits of the issue and the petitioner has knowingly and understandingly failed to appeal the trial court's ruling.

(2) The Superior Court has ruled on the merits of the issue and the petitioner has knowingly and understandingly failed to avail himself of further appeals.

(3) The Supreme Court has ruled on the merits of the issue.

(b) Issues waived.-For the purposes of this subchapter, an issue is waived if:

(1) The petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter.

(2) The petitioner is unable to prove the existence of extraordinary cir-

cumstances to justify his failure to raise the issue.

(c) Presumption.-There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure."(Emphasis supplied.)

The defendant has the burden of proving that the issues that he raises in the Post Conviction Petition have not been finally litigated and, if the issues have not been raised on appeal, he is obliged to prove the existence of extraordinary circumstances to justify his failure in raising these issues. The burden of establishing the grounds upon which post conviction relief is granted rests upon the person seeking that relief. (See Commonwealth v. Fox, 272 Pa.Super. 8, 414 A.2d 642; Commonwealth v. Logan, 464 Pa. 423, 424, 364 A.2d 266).

On January 28, 1985 this Court held an evidentiary hearing on defendant's

Post Conviction Petition. Counsel for the defendant proposed to call John Armstrong, Esq. Attorney Armstrong represented the defendant in Indiana County. The defendant was scheduled for a murder trial in Indiana County which was to be tried prior to a murder trial in Westmoreland County. (The murder trial in Westmoreland County is the subject of these proceedings.) Prior to the commencement of the trial in Indiana County, the defendant entered a plea of guilty second degree murder and the other charges against John Lesko in Indiana County were nolle prossed. The proffered testimony at this evidentiary hearing endeavored to explain the terms of the Indiana County guilty plea. Attorney John Armstrong was going to testify that the terms of the guilty plea were that the defendant would plead guilty to second degree murder; however,

the sentence of life imprisonmment would not be imposed until after the trial in Westmoreland County so that the Indiana County conviction would not be used in the Westmoreland County trial as an aggravating circumstance.

This Court sustained the Commonwealth's objection to the proffered testimony for the reason that it was irrelevant to this evidentiary hearing. If the proffered testimony had any relevancy it was in Indiana County, in a motion to withdraw the defendant's guilty plea. Secondly, Commonwealth's objection was sustained because the proffered testimony related to an issue which had been finally litigated; thus, excluded as a viable issue in a Post Conviction Hearing Act proceeding. The propriety of the guilty plea in Indiana County had been affirmed and sustained by the Pennsylvania Supreme Court. (See

Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1983)). The Pennsylvania Supreme Court also sustained and affirmed the use of the Indiana County guilty plea as an aggravating circumstance in the Westmoreland County trial. (See Commonwealth v. Travaglia, supra.) The merits of this issue will more fully be addressed in another part of this Opinion.

The first ISSUE, as expressed in defendant's petition, is dismissed for two reasons. First, the defendant did not "prove the existence of extraordinary circumstances to justify his failure to raise the issue." Secondly, this ISSUE must be dismissed because "the Supreme Court has ruled on the merits of the issue." The Pennsylvania Supreme Court impliedly affirmed the trial court's position on this ISSUE when it approvingly referred to the trial

judge's reference to the factor of sympathy in his charge to the jury.

> ["This, in fact, was the essence of the trial court's instruction--that sympathy was not a factor to be considered in the jury's deliberations, that there was sympathy on both sides of the case. (N.T. p. 1706). This was not an improper argument for the prosecutor to have made."
>
> Commonwealth v. Travaglia, supra, p. 301.

The defendant's factual averment in defendant's ISSUE NO. 1 represents only a portion of the court's charge on the consideration of sympathy. The trial court informed the jury that they should not consider sympathy for or against the defendant. The trial judge, in presenting this charge to the jury, is saying that the jury should not consider the sympathy for the defendant nor the sympathy for the deceased victim. The relevant portion of the trial judge's

charge is as follows:

> "Now, the verdict is for you, members of the jury. Remember and consider all of the evidence, giving it the weight to which you deem it is entitled. Your decision should not be based on sympathy, because sympathy could improperly sway you into one decision--into a decision imposing the death sentence, or could improperly sway you against the decision of imposing the death sentence. There is sympathy on both sides of that issue. Sympathy is not an aggravating circumstance; it is not a mitigating circumstance."
> (N.T. p. 1706).

For the above-mentioned reasons, defendant's ISSUE NO. 1 has no merit and is dismissed.

ISSUE NO. 2 is dismissed because "the Supreme Court has ruled on the merits of the issue." (Furthermore, the United States Supreme Court has denied a writ of certiorari). The Pennsylvania Supreme Court in its majority opinion held that it was proper to use the defendant's Indiana County guilty plea as

an aggravating circumstance in the Westmoreland County homicide trial. Justice Nix's concurring opinion was primarily directed to this issue. This concurring opinion differed with the majority opinion in that Justice Nix felt the execution of the death sentence should be stayed until the Indiana County plea of guilty would be reviewed and affirmed by the Pennsylvania Supreme Court. Because the defendant's appeal of the Indiana County plea of guilty was considered by the Pennsylvania Supreme Court and the sentence was affirmed, Justice Nix was satisfied that this issue was no longer viable and could not affect the death sentence in the case at bar. Justice Nix's concurring opinion set forth the following:

> "Appellant Lesko initially filed a motion to withdraw his guilty plea in the Indiana County case on December 3, 1980, prior to the trial in Westmoreland Coun-

> ty, and filed an amended motion to withdraw on April 13, 1981. His motion, as amended, was denied on June 5, 1981. Lesko's challenge to that denial was rejected, and he was sentenced on July 17, 1981 to a term of life imprisonment. Lesko appealed to the Superior Court, which transferred the appeal to this Court. In Commonwealth v. Lesko, ____Pa.____, 467 A.2d 307 (1983), this Court affirmed the judgment of sentence. Thus as to Lesko my concern expressed here is satisfied."
>
> Commonwealth v. Travaglia, supra, p. 305, at n.2.

ISSUE NO. 2 is dismissed for the reason that it has been finally litigated by the Pennsylvania Supreme Court. (See Commonwealth v. Lesko, supra and Commonwealth v. Travaglia, supra.

The averments in ISSUE NO. 3 are vague. ISSUE NO. 3 impliedly contends that the death penalty violates the constitutional prohibition against cruel and unusual punishment. This issue is

dismissed because "the Supreme Court has ruled on the merits of the issue." The Pennsylvania Supreme Court in the case of Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied sub nom. Zettlemoyer v. Pennsylvania, __ U.S.___, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983), has held that capital punishment does not inevitably violate the prohibition of the Eighth Amendment against cruel and unusual punishment.

For the above-mentioned reason, ISSUE NO. 3 has no merit and is dismissed.

The defendant's ISSUE NO. 4 is dismissed because "the Supreme Court has ruled on the merits of the issue." The Pennsylvania Supreme Court in its review of this case has conducted a "Proportionality Review" of the death sentence

as imposed upon this defendant:

> "We have searched the records of these cases available to this Court for information as to the character of the defendants (e.g. intelligence, family background, psychiatric history, previous criminal record), and the circumstances, both aggravating and mitigating, of their crimes. We find that the sentence of death is not excessive or disproportionate to the penalty imposed in these similar cases."
>
> Commonwealth v. Travaglia, supra, p. 304.

Contrary to the averments in ISSUE NO. 4, the jury did find that defendant John Lesko was an accomplice of Michael Travaglia and intended to cause the death of the victim. The trial judge, after correctly defining accomplice, explained the limited circumstances under which the defendant John Lesko could be equally guilty and equally responsible as the actual perpetrator of the criminal act. The following is the trial judge's charge on an accomplice's

criminal responsibility. It is a correct expression of the law.

> "Now, in this trial no evidence was presented to show or indicate that the defendant, John Lesko, shot the victim, Leonard Clifford Miller; the evidence, as presented, indicates that it was the defendant, Michael Travaglia, who shot the victim. Even though John Lesko did not do the shooting, it is possible to find him guilty of the same degree of homicide, criminal homicide, as Michael Travaglia, that is, if you will find Michael Travaglia guilty of any degree of criminal homicide. You could find John Lesko guilty only if you find John Lesko was an accomplice of Michael

Travaglia. It is possible to find a defendant guilty of a crime without finding that he personally performed the acts required for the commission of that crime. A defendant is guilty of a crime if he is an accomplice of the other person who commits that crime. He is an accomplice if, with the intent of promoting or facilitating the commission of the crime, he encourages, aids or assists such other person in committing the crime.

"Now, the mere presence at the scene of the crime is not sufficient to find a defendant to be an accomplice. Mere knowledge that another proposes to do an unlawful act is not

sufficient to constitute a conspiracy.

"Before you find such defendant to be an accomplice, you must find that the defendant shared the criminal intent of the active perpetrator and encouraged or assisted him or engaged in comparable overt acts. Therefore, if, under the rules of law that I have just given to you, you find that John Lesko was an accomplice and if you find Michael Travaglia was guilty of some degree of homicide, then you could find John Lesko guilty of the same degree of homicide."

(N.T. p. 1276, 1277.)

Based upon the trial judge's instructions and the evidence presented

during the trial, especially the testimony of Richard Rutherford, the jury found defendant, John Lesko, to be an accomplice, who shared the criminal intent of the active perpetrator and encouraged or assisted him or engaged in comparable overt acts.

ISSUE NO. 4's reference to "prejudice and inflammatory evidence" presumably refers to the testimony about the killing of William Nicholls. The Pennsylvania Supreme Court has ruled on the merits of this issue. (See Commonwealth v. Travaglia, supra.) This evidence unquestionably prejudiced the defendant--that's how defendants get convicted. To some extent this evidence was inflammatory; however, the Pennsylvania Supreme Court and the trial judge held that the evidentiary or probative value of this evidence greatly outweighed any possible prejudice.

For the above reasons, ISSUE NO. 4 has no merit and is dismissed.

ISSUE NO. 5 is dismissed because "the Supreme Court has ruled on the merits of the issue." The Pennsylvania Supreme Court in its Opinion in Commonwealth v. Travaglia, supra, stated, "We also find...that the sentences were not 'the product of passion, prejudice or any other arbitrary factor.'" For this reason defendant's ISSUE NO. 5 has no merit and is dismissed.

ISSUE NO. 6 is dismissed. It has no relevancy to the relief requested in defendant's petition. The County of Westmoreland has paid for defendant's attorneys and all legal expenses relating to the trial and the appeals. Westmoreland County has supplied defendant's counsel with a copy of the trial transcript and all relevant and related records. Westmoreland County has also supplied each

Justice of the Pennsylvania Supreme Court with a copy of the complete record. This satisfies the County's responsibility. The County has the responsibility to provide the defendant "with copies of the necessary proceedings so that appellate rights might be actively pursued." (See Commonwealth v. Ballem, 482 A.2d 1322, 1323, n.1 (1984). Westmoreland County has fulfilled its responsibility.

For these reasons, defendant's ISSUE NO. 6 has no merit and is dismissed.

After hearing, and careful consideration of the defendant's Petition, this Court finds that the ISSUES raised by defendant's Petition have no merit and, therefore, cannot serve as the basis for the relief requested.

The Court enters the following Order:

Dated: June 11, 1985.

IN THE COURT OF COMMON PLEAS
WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION
NO. 681 C 1980

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN CHARLES LESKO

ORDER

AND NOW, to-wit, this 11th day of June, 1985, after hearing and review of defendant's Petition Under Post Conviction Hearing Act, the relief requested by defendant is DENIED.

BY THE COURT:

s/ Gilfert M. Mihalich ,J.
GILFERT M. MIHALICH, JUDGE

APPENDIX L

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

JOHN CHARLES LESKO,
Appellant

No. 41 W.D. Appeal Docket, 1982

Supreme Court of Pennsylvania.

Argued March 10, 1983

Decided September 29, 1983

Before ROBERTS, C.J., and NIX, LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON and ZAPPALA, JJ.

OPINION

ZAPPALA, Justice.

It is undisputed that on May 19, 1980, the Appellant John Charles Lesko pled guilty to murder in the second degree for the killing of William C. Nicholls. This plea was entered into on the day the matter was set for jury trial, after a brief discussion between the attorney for the Appellant and the

Indiana County District Attorney. It appears from the record that in return for the Appellant's plea of guilty to a charge of murder in the second degree, the Commonwealth dismissed the remaining charges of murder, complicity to commit murder, robbery and theft. Furthermore, the Commonwealth would not pursue sentencing of the Appellant until as least June 2, 1981 or later. Thereafter, on or about December 1, 1980, the Appellant filed a motion to withdraw his guilty plea.

In support of his motion, the Appellant alleged that given time for reflection, he wished to exercise his constitutional right of a trial by jury. This motion was subsequently amended on or about April 13, 1981 to allege that the Appellant was motivated to plead guilty "as a result of his illegal arrest and subsequent confession" (R. 26). Fur-

thermore, he indicated that an element of the plea arrangement was that his plea in this case could not be used in his Westmoreland County trial.[1] Since the District Attorney of Indiana County testified in the trial in Westmoreland County notwithstanding the Appellant's understanding of the plea agreement, the Appellant wished to withdraw his guilty plea. After taking testimony, reviewing briefs and the record, the learned trial judge dismissed the motion on or about June 5, 1981. Thereafter, the Appellant was sentenced to life imprisonment on the second degree murder charge. The Appellant filed an appeal to the Superior Court, which subsequently transferred the matter sua sponte to this Court. On appeal, the Appellant raised

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[1]The case in Westmoreland County was Commonwealth v. Lesko, 502 Pa. 474, 467 A.2d 288.

for the first time the issue of the ineffectiveness of trial counsel. Even though no hearing has been conducted regarding this issue, we have assumed jurisdiction of this issue for the sake of judicial economy. Furthermore, remanding for an evidentiary hearing would not assist us in the disposition of this appeal.

In the lower court opinion, the trial judge found that "the evidence established: that the defendant entered his plea of guilty to second degree murder upon agreement of the Commonwealth to delay sentencing as a deliberrate choice of trial strategy in an effort to prevent evidence of his criminal acts in Indiana County from being considered as an aggravating circumstance during his first degree murder trial for killing a Westmoreland County police officer." (R. 51). The Appellant agrees with this

finding and now argues that his trial counsel was ineffective for persuading him to plead guilty in that trial counsel's conception of the use of this plea in the Westmoreland County case was in error.[2] Because it appears that the action of the Appellant's trial counsel was a calculated attempt to avoid the use of any Indiana County conviction in the Westmoreland County case as an aggravating circumstance, trial counsel cannot be deemed to be ineffective.

In Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 235 A.2d 349

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[2]The Appellant argues that trial counsel was ineffective because he failed to correctly interpret "conviction" as used in the Sentencing Code, the Act of September 13, 1978, P.L. 756 No. 141 § 1, as amended 1980, October 5, P.L. 693 No. 142 § 401(a). This issue is discussed in the related case of Commonwealth v. Lesko, 502 Pa. 474, 467 A.2d 288 (1983).

(1967), Mr. Justice Roberts, now Chief Justice, cogently discussed the issue of ineffectiveness of trial counsel. Initially, trial counsel is presumed to be competent, and his allegedineffective actions must be evaluated to determine whether the strategy chosen is founded upon a reasonable basis designed to further his cleint's interests. We recently reaffirmed this test for determining ineffectiveness of trial counsel.

> The test of constitutional effective assistance of counsel is whether a particular course chosen by counsel has some reasonable basis designed to effectuate its client's interest. (Citations omitted) (Emphasis in original). The initial factor that is considered in applying this standard is whether the matters counsel is charged with failing to pursue had arguable merit. (Citations omitted).

Commonwealth v. Wade, 501 Pa. 331, 461 A.2d 613 (1983). See also Commonwealth v. Upsher, 497 Pa. 621, 444 A.2d 90

(1982); Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977).

This rule is founded upon the inequity of finding trial counsel ineffective for pursuing a strategy which at the time appeared to be in his client's best interest. It is grossly unfair to characterize trial counsel as ineffective when his strategy was formulated without the luxury of knowing the result of the chosen strategy. It is much easier to fault counsel on his chosen strategy after reviewing all the evidence and observing how the witnesses withstood the rigors of crossexamination. Therefore, in reviewing trial counsel's strategy, we must place ourselves in the position of trial counsel at the time the strategy was formulated to determine if the alternatives chosen were reasonable.

The Appellant contends that his trial counsel was ineffective for advising him to plead guilty to second degree murder in Indiana County with a delay in sentencing to avoid such conviction being considered as an aggravating circumstance in the penalty phase of the Westmoreland County case. Rather than deeming trial counsel's actions ineffective, we find it was a reasonable attempt to prevent an almost certainty from occurring. If the Appellant had been tried on May 19, 1980 as scheduled, there is no question that the prosecutor could have offered sufficient evidence to warrant a guilty verdict. This is clear from a. review of the guilty plea colloquy. Thus, a conviction and sentencing would have occurred prior to the trial in Westmoreland County. Accordingly, under any interpretation of § 9711(d)(10) of the Sentencing Code, 42

Pa.C.S.A. § 9711(d)(10), the Appellant's conviction would be admissible in the Westmoreland County case as an aggravating circumstance. Trial counsel attempted to avoid this certainty by preventing sentencing until the Westmoreland County case was completed. It was hoped that by following this course, the Westmoreland County judge would disallow the Indiana County guilty plea from being introduced in the penal phase of the trial as an aggravating circumstance, because no sentence had been imposed in Indiana County. However, the Westmoreland County trial judge correctly determined that the plea was admissible.[3] Although trial counsel's strategy failed, he cannot be deemed ineffective. Having determined that

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[3]Commonwealth v. Lesko, 502 Pa. 474, 467 A.2d 288 (1983).

trial counsel's actions were reasonable and designed to protect the Appellant's interests, it is clear that these actions cannot be deemed ineffective.

Finally, the Appellant asserts that the lower court erred in refusing to allow him to withdraw his guilty plea. The Appellant argues that the lower court applied an incorrect standard in determining whether to permit the Appellant to withdraw his guilty plea.

In Commonwealth v. Forbes, 450 Pa. 185, 299 A.2d 268 (1973), we held that the proper standard to be used for permitting a defendant to withdraw his guilty plea prior to sentencing is whether a fair and just reason exists. If the trial court finds any fair and just reason for the withdrawal, such withdrawal should be permitted because of the importance of an accused's rights

to a trial by his peers. However, once a sentence has been imposed, an accused should be permitted to withdraw his guilty plea only "to correct a manifest injustice." Commonwealth v. Starr, 450 Pa. 485, 301 A.2d 592 (1973). The basis for the difference between these two standards is clear. Allowing an accused to withdraw his guilty plea after imposition of sentence requires a stricter standard to prevent defendants from using a guilty plea as a tool for previewing the sentencing by the court. Such a misuse does not occur when withdrawing a guilty plea prior to sentencing.

The lower court applied the "manifest injustice" standard, reasoning that the Appellant was pre-advised of the only possible sentence. Therefore, the Appellant's petition was akin to a post-sentencing petition. Because the Appel-

lant was well aware of the only sentence imposable for the crime to which he pled guilty, we find no error in applying the "manifest injustice" standard. In any event, applying the "fair and just reason" standard will not give the Appellant the requested relief.

The reasons offered by the Appellant in support of his motion to withdraw his guilty plea were that his guilty plea was motivated by an illegal arrest and subsequent confession[4] and that the Indiana County District Attorney breached the plea bargain agreement by testifying in the Appellant's Westmoreland County trial. The Appellant argues that by the terms of the agreement, the

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[4]The Appellant's argument that the guilty plea was motivated "as a result of his illegal arrest and subsequent confession" is also without merit for the reasons set forth in the related appeal cited at 502 Pa. 474, 467 A.2d 288 (1983).

Indiana County conviction could not be used in his Westmoreland County trial. We have reviewed the record and find no such agreement. The agreement provided that sentence not be imposed until sentence not be imposed until June 2 or later. At no time did the District Attorney agree not to testify in Westmoreland County and only did so in lieu of being subpoenaed. Therefore, the plea bargain agreement was not breached.

For the foregoing reasons, it is clear that the lower court did not abuse its discretion in not allowing the Appellant to withdraw his guilty plea.

Judgment affirmed.

90-1880

FILED
JUN 7 1991
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

JOHN CHARLES LESKO,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
VOLUME III

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APPENDIX M

IN THE COURT OF COMMON PLEAS
INDIANA COUNTY, PENNSYLVANIA

NOS. 35, 63 & 64 CRIM., 1980

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN CHARLES LESKO

OPINION AND ORDER OF COURT

EARLEY, J.

This matter is before the Court on a motion to withdraw the guilty plea entered by the defendant, John Charles Lesko, in open court on May 19, 1980, to second degree murder. Hearing was held on the defendant's motion to withdraw his plea on April 28, 1981. On the basis of that hearing, the parties' briefs and the record of the case, the Court hereby denies the defendant's motion to withdraw his plea.

HISTORY OF THE CASE

The defendant is charged with a number of offenses in three separate Informations filed by the prosecutor. 1) criminal homicide classified as murder and complicity to commit murder, 35 Crim. 1980, filed by February 7, 1980; 2) robbery and theft by unlawful taking or disposition, 63 Crim. 1980, filed April 24, 1980; 3) robbery and theft by unlawful taking or disposition, 64 Crim. 1980, filed April 24, 1980.

Counsel independent of the Public Defender's Office was appointed to represent the defendant on January 21, 1980. The defendant was arraigned on the criminal homicide charges on February 14, 1980, pleaded not guilty and requested trial by jury. The defendant was arraigned on the robbery and theft charges in the remaining Informations on

April 28, 1980, pleaded not guilty and requested trial by jury.

An Omnibus Pretrial Motion was filed on behalf of the defendant on March 14, 1980, in which the defendant, among other things, requested investigative fees, contested the legality of his arrest, contested the admissibility of certain statements he made after his allegedly illegal arrest, and gave notice of a possible insanity defense. The sum of $500.00 was granted the defendant for investigative fees on March 31, 1980. A hearing was held on April 24, 1980, and on May 14, 1980, the Court, Judge Handler, disposed of the defendant's omnibus pre-trial motions denying the defendant's motion to suppres the statements he made after his arrest.

The defendant was scheduled for trial on May 19, 1980; however, he en-

tered a plea of guilty to second degree murder on, said May 19, 1980, in exchange for the agreement of the Commonwealth to drop all the charges at 63 Crim. 1980, 64 Crim. 1980, and the complicity charge in 35 Crim. 1980 and to defer sentencing until the end of June, 1980, or later. At the time the defendant entered the plea, he was faced with charges in Westmoreland County, including the charge of first degree murder of a Westmoreland County police officer, in which the Commonwealth sought the death penalty.

The defendant filed a motion to withdraw his guilty plea more than six months later, on December 3, 1980. The defendant therein stated that he "realizes that his plea in open court was made freely and voluntarily, with no coercion, threats or promises, and... admitted that he wished to plead guilty

because he was guilty of Murder and Complicity" but that he "has had time to reflect on what he did and now wishes to withdraw his plea of guilty and wishes to go to trial" on all charges.

Subsequently, the defendant filed an amended motion to withdraw his plea on April 13, 1981, wherein he averred:

> "3. Defendant reflects and does not wish to waive his rights afforded him by Constit(u)tion.
> 4. Defendant was motivated to plea guilty as a result of his illegal arrest and subsequent confession.
> 5. Defendant was motivated to plea guilty as a result of the Commonwealth's assurance that he would not be sentenced until after the trials in Westmoreland County. Implicit in this expressed promise by the Commonwealth was the fact that this plea in Indiana County couldn't be used in the trial or sentence hearing in Westmoreland County. The Commonwealth blatantly violated the plea agreement arguing the Defendant extreme prejudice and irreparable harm by testifying at the De-

fendant's trial regarding the incident in Indiana County.

6. The Defend(an)t's voluntariness of his plea evaporated when the Commonwealth introduced evidence of his Indiana County plea at the Westmoreland County trial.
7. That fairness and justice require the withdrawal of the guilty plea.
8. The prosecution is not prejudiced by Defendant request."

Hearing was held on the matter on April 28, 1981. The defense offered no testimony. The defense relied instead entirely on legal argument. The major thrust of the defendant's arguments went to the asserted breach of the plea agreement when the Commonwealth, through the District Attorney of Indiana County, testified at the penalty hearing in the defendant's Westmoreland County trial for first degree murder of a policeman as to what had happened in Indiana County. The defense argued, this testimony

was a breach of the plea agreement alleging the defendant bargained for the delayed sentence, relying on the principle that until sentencing by the Indiana County Court there would be no conviction so that evidence of the defendant's plea would be inadmissible in the Westmoreland County trial. The defense also argued that the withdrawal of the plea should be liberally allowed because the defendant has not been sentenced yet and there has been no prejudice to the prosecution. The defense conceded that there was no error in the plea colloquy, and further acknowledged that the defendant knowingly and voluntarily, under oath, admitted committing the act of homicide with which he was charged.

The Commonwealth argued that the defendant had no absolute right to withdraw his plea and that it would be unfair to allow the defendant to withdraw

a negotiated plea, entered into knowingly by the defendant and lived up to by the District Attorney. That the plea was voluntary was shown by the fact, argued the Commonwealth, that the defendant was sworn and testified that he understood what he was doing. The Commonwealth argued that prejudice would result to the prosecution because the defendant had the opportunity to review the already selected jury panel.

The Commonwealth offered the testimony of Gregory Olson, Indiana County District Attorney, that he made no promises to the defendant not to testify in Westmoreland County and authorized no one to do so. He said that the plea bargaining took place on the day scheduled for trial of the defendant's case without any prior indication that the defendant would plead guilty. The defendant at first offered his plea in re-

turn for nol pros of the other charges and then returned to ask for a delayed sentence. The District Attorney testified that there was no discussion concerning use of the plea and that there was certainly no promise that the plea would not be used. He acknowledged on cross-examination that deferred sentencing was part of the agreement but also stated that he never discussed why this was requested, assuming a tactical reason by the defendant. He acknowledged that he had testified in the Westmoreland County trial at the defendant's sentencing hearing on request of the Westmoreland County District Attorney that he do so or be subpoenaed. He also testified that this testimony was given in January, 1981.

Both parties were given the opportunity to present briefs on the issue to the Court and have done so.

FINDINGS OF FACT

From the record of this case and the evidence presented to this Court, the Court makes the following findings of facts:

The defendant pleaded guilty to second degree murder in return for the agreement of the prosecutor to nol pros all other charges at the time of sentencing and to defer sentencing until after the defendant's contemplated trial date in Westmoreland County in June, 1980.

The defendant's plea was counseled, knowing, intelligent, understanding, voluntarily, and freely entered at the request of the defendant.

The completeness of the colloquy is unchallenged. The defendant admitted under oath in open Court that he took the victim's life.

The defendant has failed to offer credible evidence that his plea was hasty and unreasoned or that the plea bargain was breached by the Commonwealth; on the contrary the credible evidence shows that the defendant's assertions are fiction and that the defendant knowingly, voluntarily, and intelligently entered his plea as part of his Westmoreland County "death trial" strategy.

The agreement by the Commonwealth that sentence on his Indiana County plea would be delayed until after his Westmoreland County trial was completed has been complied with by the Commonwealth.

The colloquy reveals that the defendant's attorney upon inquiry by the Court stated that the plea bargain to be as follows: that the defendant would plead guilty to second degree murder in return for the nol pros by the commonwealth of all other charges and a delay

in sentencing. Plea colloquy, at 31-33. The Court then inquired of the defendant whether this was his understanding of the agreement and defendant replied, "Yes." Plea colloquy, at 33. Neither the defendant nor his attorney at any time brought to the attention of this Court that either of them thought that a basis of the bargained for delay in sentencing was that the prosecutor had guaranteed that evidence of the plea would not be used in the defendant's later trials. The prosecutor's testimony at the plea hearing also establishes that the defendant never even discussed such an agreement. The promise in the instant case was that the defendant's sentence for second degree murder would be delayed; there was no promise on behalf of the Commonwealth, nor request by the defendant, that evidence of the defendant's Indiana County

plea would not be used against him at other trials.

DISCUSSION

The defendant's argument that this explicit promise by the Commonwealth carried with it an implied promise of later non-use of the plea in other trials is without merit in view of the fact that if the defendant had intended non-use of his plea to be central to his bargain he would have made it part of the bargain. Commonwealth v. Scott, Pa.Super., 414 A.2d 388, at 390 (1979); United States v. Miller, 565 F.2d 1273, at 1275 (3rd Cir. 1977).

There is no basis in law or fact for this counselled defendant to have expected that the Indiana County Court or the District Attorney of Indiana County would have the authority to bind the Westmoreland County courts in the conduct of criminal trials.

Logically, the evidence establishes that the defendant entered his plea of guilty to second degree murder upon agreement of the Commonwealth to delay sentencing as a deliberate choice of trial strategy in an effort to prevent evidence of his criminal acts in Indiana County from being considered as an aggravating circumstance during his first degree murder trial for killing a Westmoreland County police officer. The fact that this trial strategy was unsuccessful, by virtue of a ruling by the Westmoreland County trial judge, in preventing the District Attorney of Westmoreland County from using the plea during the penalty potion of his Westmoreland County trial cannot be a breach of bargain by the Indiana County District Attorney. Commonwealth v. Scott, supra; Commonwealth v. Sanutti, 454 Pa. 344, 312 A.2d 42 (1973); Commonwealth v.

Terry, 457 Pa. 185, 321 A.2d 645 (1974). See Commonwealth v. Zuber, 466 Pa. 453, 353 A.2d 441 (1976) for a case with a different result but note that the factual situation therein differs drastically from the situation of his defendant.

In determining whether to permit a plea withdrawal, our courts have apparently adopted the ABA Standards for pleas withdrawal. Commonwealth v. Ammon, Pa.Super. 418 A.2d 744 (1980). Those Standards provide for a dual approach to the matter of plea withdrawals. Where the defendant moves to withdrawal his plea after sentence has been imposed, it is said that he must prove that withdrawal is necessary to correct a manifest injustice and manifest injustice is narrowly defined. But where he moves to withdraw his plea prior to sentence, it is said that the

court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution substantially prejudiced by reliance upon the defendant's plea. The standard of any fair and just reason has been expansively interpreted by our courts.

It is the opinion of this Court that the defendant's motion must be analyzed under the manifest injustice standard. Although the defendant has not yet been sentenced, the circumstances of this case make the case more closely analogous to cases in which the motion is made after sentencing than to cases in which the motion is made before sentencing.

The reasons[1] for the Court's application of the manifest injustice standard are as follows:

The prosecutor honored the plea agreement by delivering a delay in sentencing to the defendant. Thus, the case is closely akin to the cases in which motions to withdraw pleas are made after sentence has been imposed because this defendant has received the benefit of his bargain prior to the time he moved to withdraw his plea. Commonwealth v. Hare, 475 Pa. 234, 380 A.2d 330, at 333 (1977). In December, 1980, when the defendant moved to withdraw his

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[1]These same reasons demonstrate, under the fair and just reason standard, that the Commonwealth has been substantially prejudiced by reliance on the defendant's guilty plea. Thus, this Court would not allow the defendant to withdraw his plea even if this Court were to find that the fair and just reason standard applied to this case.

plea, the delay had already been delivered and the defendant had the opportunity to make from the delay whatever he could. Primarily, whatever else the delay would provide him, the defendant received a rescheduling of his trials between Indiana County and Westmoreland County.

The second reason for applying the manifest injustice standard to this case is the fact that the defendant knew at the time he entered his plea that the offense of second degree murder, to which he pleaded guilty, carried a mandatory sentence of life imprisonment. Thus, potential for abuse is as significant in this case as in cases where the defendant attempts to withdraw his plea after sentence has been imposed because in both instances the defendant would unfairly be able to change a known outcome if he could withdraw his plea.

This defendant can decide that the sentence is no longer to his liking on the same after-the-fact basis as the defendant who has been sentenced prior to filing to withdraw his plea. Commonwealth v. Starr, 450 Pa. 485, 301 A.2d 592, at 594 (1973).

The third reason for applying the manifest injustice standard to this case is the lengthy delay of more than six months between entry of the plea and the motion to withdraw the plea during which the defendant had the opportunity to sit back and await developments in his Westmoreland County trial before deciding to withdraw his plea. The potential for abuse from lengthy delay in a case like this is enormous. Here the defendant had the opportunity to see how his trial in Westmoreland County was developing; he had the opportunity to see how his

pretrial motions in the Westmoreland County case were disposed of; he saw how amenable the Westmoreland County courts were to his arguments; he was armed with the knowledge that the Westmoreland County courts were unable to select a jury from among the citizens of this part of the state and thus no longer ran the risk that a panel of local jurors would know the extent of his escapades. Moreover, he could easily decide that he had already gained whatever advantage he could from his plea because of the fact that he had ensured the effective rescheduling of his trials. Having nothing to gain from his plea besides that rescheduling, he could now decide to withdraw his plea and demand a jury trial. In either case, whether the defendant sensed that his legal arguments were not being met favorably in the Westmoreland County courts or whether he

had already achieved his purpose, there is a tremendous potential for abuse from lengthy delay in a case like this if the defendant were allowed to withdraw his plea for reasons amounting to less than manifest injustice. Commonwealth v. Robinson, 228 Pa.Super. 179, 324 A.2d 790 (1974); see United States v. Barker, 514 F.2d 208, at 222 (D.C. Cir. 1975) cert. denied 421 U.S. 1018, 95 S.Ct. 2420 (1975) as to the different considerations that become involved when lengthy delay is present.

The final reason for applying the manifest injustice standard is that the evidence shows that the defendant entered his plea as a deliberate choice of trial strategy, i.e., the defendant deliberately bypassed trial in Indiana County to keep evidence of his crimes in this county out of his trial in Westmoreland County. Commonwealth v. Muni,

Pa., 404 A.2d 378, at 380 (1979); Commonwealth v. Sullivan, 450 Pa. 273, 299 A.2d 608 (1973), cert. denied, 412 U.S. 923, 93 S.Ct. 2745 (1973).

Under the ABA Standards, withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:

> (1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rules;
>
> (2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;
>
> (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed;
>
> (4) he did not receive the charge or sentencing concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement; or
>
> (5) he did not receive the charge or sentence concessions contemplated by the plea agreement concurred in by the court, and he did not affirm his plea after being advised that the court no longer concurred

> and being called upon to either affirm or withdraw his plea.

Commonwealth v. Starr, 450 Pa. 485, 301 A.2d 592 (1973).

Of these Standards, only the third and fourth could conceivably apply to the allegations contained in the defendant's motion, i.e., that his plea was involuntary and that the Commonwealth breached the bargain with him. For reasons previously discussed in this Opinion, this Court does not agree that the defendant's plea was involuntary or that his bargain was breached.

The only other argument that the defendant makes which rises to the level of manifest injustice is his claim that the plea was motivated by an illegal arrest and unconstitutionally obtained confession. The record shows, however, that the defendant entered his plea with full knowledge that this claim had been

decided adversely to him in the disposition of his Omnibus Pretrial Motion and that his trial was to begin the very day that he entered his plea. The court can see no merit in reassertion of the claim as a reason for withdrawing his plea where the claim has already been adjudicated adversely to the defendant, the defendant presents no new evidence on the claim, and the issue raised by the claim is reviewable on appeal to a higher court. Commonwealth v. Bromund, Pa.Super. 420 A.2d 493 (1980). Commonwealth v. Lane, 265 Pa.Super. 35, 401 A.2d 787 (1970).

The instant case points to the basic problem of the entire criminal justice system, i.e., the problem that no case is ever finally resolved. The liberal allowance of withdrawals of pleas of guilty for less than significant reasons amounting to manifest injustice permits

criminal defendants to manipulate the courts at the cost of public trust and great financial expense to the taxpayer. In addition, a plea colloquy adhering to the criteria of our statutes and case law renders the reasons for liberally allowing withdrawal or pleas by defendants nugatory because the very purpose of such plea colloquys is to assure that the defendant enters his plea knowingly, voluntarily, and intelligently. Commonwealth v. Sutton, 474 Pa. 582, 379 A.2d 107 (1977); Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, at 1632 (1977).

Modern criminal procedure assures the criminal defendant that he shall be represented by counsel and further that his counsel must be effective in his representation of the criminal defendant. In addition to appointment of counsel, the defendant, if indigent, is

granted finances for investigative fees, mental examinations, expert witnesses, and the entire gambit of the Commonwealth's case as reported in police and other investigative reports. Upon digesting all of the Commonwealth's case and interjecting any theories provided by his hired investigators and experts, the defendant then may request the Court to permit him to enter a pleas of guilty in order to dispose of his case.

The plea is conducted in open court where the defendant is assisted by his attorney and where the Court conducts an extensive give and take with the defendant, who is under oath, to insure that he understands the nature of the charges against him, his right to trial by judge or jury, his presumption of innocence and right to remain silent, the fact that he may aid his attorney in the selection of trial jurors and that their

verdict must be unanimous, that if he pleads guilty he is admitting that he committed the crime charged by the Commonwealth. The defendant is provided with a detailed explanation of the elements of each crime charged. In addition, he is apprised of his right to file posttrial motions and that his right to appeal will be limited if he enters a plea of guilty. He is asked about any plea bargain, the bargain is reviewed, and the defendant is informed that if a breach of the bargain occurs he may withdraw his plea; he is further informed of the maximum limits of any sentence that may be imposed on him by virtue of his plea regarding incarceration and fines. The defendant is then cautioned to listen to the prosecutions' factual basis for the charges against him and informed that he may challenge any fact recited by the

prosecution that he does not agree with.

In the instant case, the Court complied with all of those criteria and on numerous occasions the defendant admitted in open court under oath that he understood that by his plea he was admitting that in the course of a robbery of his victim he intentionally bound the victim, kicked the ice loose from the surfaces of the dam and tossed in the victim, leaving him to drown. Plea colloquy, at 27, at 32-33, at 34, at 38, at 39-40.

A reading of the plea colloquy in the instant case logically and clearly indicates that this defendant waived his right to trial by jury or judge - counseled, informed, and without fear or threat. Elementary justice requires that a defendant who knowingly, voluntarily, and intelligently waives a con-

stitutional right to be held to the consequences of that waiver. Our criminal justice system must not only insure that criminal defendants are fairly treated, but with equal vigor it must insure that society is protected and the integrity of the court maintained. To allow the defendant in this case to withdraw his plea for reasons of less merit than those recognized as amounting to manifest injustice would deny the criminal justice system's obligation to protect society and place the Court in the position of resorting to a fiotion in order to ignore the defendant's counseled admission of guilt under oath.

Finally, this Court questions the continued efficacy of permitting criminal defendants to withdraw their pleas of guilty whether before or after sentencing for lesser reasons than manifest injustice, i.e., "fair and just" rea-

sons. The real issue in whether or not a criminal defendant should be permitted to withdraw a counseled, knowing, and willing plea of guilty goes to the very core of the proper administration of criminal justice in this country. Proper administration of criminal justice demands that the competing interests of defendants and the law abiding public be balanced. That balance cannot long survive nor tolerate the withdrawal of guilty pleas by criminal defendants except for significant reasons amounting to manifest injustice where the defendant knowingly, willingly, and intelligently waives his right to trial by judge or jury, pursuant to a plea bargain and colloquy, represented by counsel, and where the defendant under oath in open court admits that he has committed the act or acts with which he is charged. To tolerate a lesser standard

has, and will, undermine the confidence of the public in our criminal justice system, and has, and will, encourage the criminal defendant to flaunt his lack of respect for the criminal justice system.

The time has come to stop equating counseled pleas of guilty, entered into in open court in the presence of a judge, and by a defendant under oath, with confessions unlawfully coerced from a criminal defendant.

The time has come to restore integrity to our courts and to restore respect for the criminal justice system in the eyes of the public.

The time has come to hold a counseled, informed, and uncoerced criminal defendant to his plea agreement where no manifest injustice is established.

WHEREFORE, the Court makes the following order:

IN THE COURT OF COMMON PLEAS
INDIANA COUNTY, PENNSYLVANIA

NOS. 35, 63 & 64 CRIM., 1980

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN CHARLES LESKO

ORDER OF COURT

AND NOW, June 5, 1981, the defendant Lesko's motion to withdraw his guilty plea is hereby denied.

It is further ordered that the District Attorney schedule the defendant for sentencing at the earliest possible date.

BY THE COURT,

/s/ Robert C. Earley
Judge.

APPENDIX N

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

MICHAEL J. TRAVAGLIA,
Appellant

No. 26 W.D. Appeal Docket, 1982

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

JOHN CHARLES LESKO,
Appellant

No. 37 W.D. Appeal Docket, 1982

Supreme Court of Pennsylvania
Argued March 10, 1983
Decided September 29, 1983
Reargument Denied December 14, 1983

Before ROBERTS, C.J., and NIX, LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON and ZAPPALA, JJ.

OPINION

ZAPPALA, Justice

We are called upon to review convictions of first degree murder, for which the Appellants were sentenced to death.

Pursuant to 42 Pa.C.S. § 9711(h), we examine the record for errors at trial, and to determine whether the sentence of death should be affirmed or vacated.

I. BACKGROUND

In the early morning hours of January 3, 1980, Apollo Police Officer Leonard Millr was killed by two bullets from a .38 caliber hand gun, after having stopped a silver-colored Lancia sports car, containing three men, which had several times sped past his position at the Apollo Stop-and-Go convenience store. Officer Miller was found lying on the highway by police officers who were responding to his radio request for assistance. His service revolver had been drawn, and all six rounds had been fired. Police investigation turned up the Lancia, abandoned, with the windows shattered and bullet holes in it. It was established that the autombobile was

registered to one William Nicholls of Pittsburgh who had recently disappeared.

Prior to the Miller homicide, state police had received evidence indicating that Appellant Travaglia may have been involved in a number of armed robberies and killings which had taken place in Pittsburgh and surrounding counties. Pursuant to their investigation, the state police had found a vehicle, owned by a homicide victim, abandoned near a motel where Travaglia and a man named Daniel Keith Montgomery had been staying.

Pittsburgh police located Montgomery in the early evening hours of January 3, 1980 in the downtown area of Pittsburgh. While questioning him, they discovered a .38 caliber revolver on his person. Montgomery told the police that Travaglia had given him the weapon and that he (Travaglia) and Appellant Lesko had at that time talked about "wasting a

policeman." Montgomery then told police that both Appellants Lesko and Travaglia were staying in a room at the Edison Hotel in downtown Pittsburgh. The police proceeded immediately to the Edison where they arrested Lesko and Travaglia. Appellants were taken to the Public Safety Building and, after being given the standard Miranda warnings, were individually interrogated. Both gave statements implicating themselves in the killing of Officer Miller, and in the killings of William Nicholls, Peter Levato, and Marlene Sue Newcomer.

Following various delays caused by two changes of venue and a mistrial, trial commenced in Westmoreland County on January 21, 1981, before Westmoreland County Common Pleas Court Judge Gilfert Mihalich and a jury selected in Berks County. The jury found the Appellants guilty of the first degree murder of

Officer Miller on January 30, 1981. On February 3, 1981, the jury, finding aggravating circumstances which outweighed any mitigating circumstances, imposed the penalty of death upon Appellants.

II. TRIAL ERRORS ALLEGED

A. SUPPRESSION MATTERS

Appellants claim that they were unlawfully arrested and that certain evidence should be suppressed as the fruit of the unlawful arrest. The evidence consists of a .22 caliber revolver taken from Lesko and a confession given by each of the Appellants.

Prior to the arrest, the police knew the folloiwng:

> Three homicides by shooting had occurred in Westmoreland County between December 29, 1979 and January 3, 1980. The December 29 shooting of Peter Levato and the January 1 or 2 shooting of Marlene Sue Newcomer were done with a .22 caliber revolver. The January 3 shooting of Leonard Miller

was done with a .38 caliber revolver.

During the approximate period of the killings, there had been a series of robberies of convenience stores in Westmoreland and Indiana Counties at which the victims were bound with yellow electrical wire. Travaglia's father, Bernard Travaglia, had told the police that a spool of yellow electrical wire and a .38 caliber revolver had been stolen from him and that he suspected Travaglia of stealing the revolver. An inspection of a truck owned by Travaglia and repossessed by a bank had revealed yellow electrical wire similar to that stolen from Travaglia's father and that used in the robberies. Bernard Travaglia had also told the police that his son owned a .22 caliber revolver but had told him it was confiscated by a game warden. The Pennsylvania Game Commission had contradicted the report of the confiscation.

The victims of one of the robberies had said that the perpetrators fled in a tan Dodge Ram Charger with window curtains. The body of Marlene Sue Newcomer had been discovered in such a vehicle.

> On January 3, 1980, an arrest warrant was issued for Travaglia for receiving stolen property in connection with a burglary at Sonny's Lounge on Route 22 in Delmont, Westmoreland County. Travaglia was known to have been staying at the time with another individual at the Thatcher Motel, which was next to Sonny's Lounge. Peter Levato's car had been found abandoned on December 29, 1979, within a mile of the motel.

The police also knew that the windows of the escape vehicle used by the perpetrators of the Miller homicide had been shot out and that three men had been seen in the area hitchhiking toward Pittsburgh. A motorist, James Henderson, who gave a ride to a group of three men, had been previously acquainted with Travaglia and had identified him as one of the riders.

The police learned that Room 616 of the Edison Hotel in Pittsburgh had been rented to a Michael Simons and a Mr. Lesko. Travaglia was known to have used

the alias Michael Simons. Information obtained from Daniel Keith Montgomery confirmed that Lesko and Travaglia were in Room 616 of the Edison Hotel and indicated that Lesko still had a .22 caliber revolver. A night clerk at the hotel told police that the Appellants were still in the room. At 10:20 p.m. on January 3, the clerk unlocked the room with a pass key. The police entered without announcing their identity or purpose. Lesko pointed his gun at them before surrendering.

Travaglia claims that his arrest was unlawful because the warrant for his arrest on the charge of receiving stolen goods was issued without sufficient probable cause. We need not decide that question because we find that the validity of the arrest does not depend on the validity of the warrant. A police officer may arrest without a warrant where

there is probable cause to believe that a felony has been committed and that the arrestee is the felon. Probable cause exists where the facts and circumstances within the knowledge of the officer are reasonably trustworthy and sufficient to warrant a person of reasonable caution in believing that the arrestee has committed the offense. Commonwealth v. Jackson, 450 Pa. 113, 299 A.2d 213 (1973). The officers' investigation and the information they acquired, as detailed above, gave them probable cause to believe that the Appellants were the perpetrators of the homicides. This allowed them to arrest the Appellants without a warrant.

The Appellants also claim that the arrests were invalid because the police acted improperly in entering the hotel room without a warrant and without announcing beforehand their identity and

purpose. They base their claim on the rule prohibiting a warrantless entry into a suspect's dwelling without exigent circumstances. Commonwealth v. Williams, 483 Pa. 293, 396 A.2d 1177 (1978); Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), and on the "knock and announce" rule, Commonwealth v. Norris, 498 Pa. 308, 446 A.2d 246 (1982); Commonwealth v. Newman, 429 Pa. 441, 240 A.2d 795 (1968). The Appellants would treat the hotel room as a dwelling and apply the requirements of Williams and Payton to both the warrantless entry and the failure of the officers to announce their identities and purpose. Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) supports the Appellants' contention that they had a reasonable expectation of privacy in their hotel room. The Court in Stoner

held that a hotel clerk does not have authority to allow police to search a guest's room. However, we find that even if the requirements of Williams and Payton apply to hotel rooms, they do not render these arrests invalid. In Williams, we listed certain factors that would tend to support a finding that a warrantless arrest of a suspect in his or her home is legal. These include, inter alia, that a grave offense is involved, particularly a crime of violence; that the suspect is reasonably believed to be armed; a clear showing of probable cause--including reasonable, trustworthy information--to believe that the suspect committed the crime; and strong reason to believe that the suspect is on the premises. We find that these factors were present in this case and were sufficient to establish exigent circumstances so as to justify a war-

rantless entry and arrest. Although the exigent circumstances which "justify failure to obtain an arrest warrant are not entirely coextensive with those exigencies which justify noncompliance with the 'knock and announce' rule," Commonwealth v. Norris, 498 Pa. at 313 n.2, 446 A.2d at 248 n.2, the facts previously recited clearly demonstrate the existence of circumstances which excused compliance with this Fourth Amendment protection as well. See, Miller v. United States, 357 U.S. 301, 309, 78 S.Ct. 1190, 1195, 2 L.Ed.2d 1332 (1957); Sabbath v. United States, 391 U.S. 585, 591, 88 S.Ct. 1755, 1759, 20 L.Ed.2d 828 (1967).

Lesko challenges his confession on the basis he was not told he was a murder suspect when given his Miranda warnings. He bases his claim on an allegation that on the pre-interrogation warn-

ing form which he signed, the only charges indicated were a firearms violation and resisting arrest. He argues that because homicide charges were not also included on the form, he did not possess sufficient knowledge to understand the consequences of waiving his rights and that therefore his waiver was invalid.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) does not require that in addition to the various rights enumerated a suspect must be provided information as to the crime under investigation. This Court has held, however, that a suspect must have "an awareness of the general nature of the transaction giving rise to the investigation," in order to make an intelligent and understanding waiver of his rights. Commonwealth v. Dixon, 475 Pa. 17, 22, 379 A.2d 553, 556 (1977). See

also Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974). It was stated in Dixon that where "the defendant has not been furnished with such information [so as to make him aware of the transaction involved] and a pretrial challenge concerning the validity of a confession is made on this ground, the Commonwealth must prove by a preponderance of the evidence that the defendant knew of the occasion for the interrogation." 475 Pa. at 23, 379 A.2d at 556. In that case it was held that the Commonwealth had not met its burden. We found that there existed a palpable ambiguity as to the defendant's understanding of the reason for her interrogation before she executed the waiver of her rights. This ambiguity arose out of the fact that the defendant had defaulted in making restitution payments ordered by a justice of the peace

several months earlier, a default which she had been warned would result in her arrest. Because the Commonwealth had not refuted the reasonable inference that the defendant, when she waived her rights, thought that the interrogation was to be in regard to the default, the waiver could not be said to be an intelligent and understanding one as to questioning about a homicide, and statements elicited as to the latter were suppressed.

Appellant Lesko argues for the same result here. We find the facts to be sufficiently different, however, that applying the same rule a different result is required. From the record of the Suppression Hearing it is unclear whether Lesko was specifically told that the questioning would cover several murders before he was given the waiver form to sign. At one point Detective Frank

Amity testified: "First thing we did was read him his pre-interrogation warning form advising him of his rights, the charges against him, what we wanted to talk to him about." (Suppression Hearing, p. 553, Sept. 23, 1980) (Emphasis added). Detective Amity later testified regarding what occurred after Lesko signed the form as follows:

> Q. After you filled out this pre-interrogation warning form, what did you do?
>
> A. Well, we advised him of the charges that we arrested him for.
>
> Q. What were those?
>
> A. Violation of the Uniform Firearms Act and the recklessly endangering another person. And we also told him that he was a suspect in several murders that happened and wanted to talk to him about those.
>
> Q. After you told him this, what was the next thing that happened?
>
> A. He was more willing to tell us about everything that he did.

(Suppression Hearing, p. 558, Sept. 23, 1980).

Even if we assume that prior to being given the waiver form Lesko was not told in words that the interrogation would include questioning as to the homicides, we cannot conclude that the listing of only the two minor charges on the form created an ambiguity in Lesko's mind as to the purpose of the interrogation. It must be recalled that the four homicides about which Lesko was questioned had occurred over the five days immediately preceding the interrogation. The most recent homicide, the case at bar, had occurred in the early morning hours the same day. Indeed, Appellants Lesko and Travaglia had handed the weapon with which Officer Miller had been shot to Daniel Montgomery less than an hour before their arrest. To find under the circumstances here present that

Lesko was unaware of the general nature of the transaction giving rise to his questioning would be tantamount to treating as fact that which is patently hypothesis and fantasy. We need not expound upon the differences which distinguish these facts from those in Dixon. We think it sufficient to note that in Dixon we recognized that "the fact that interrogation follows hard upon the criminal episode and there is no circumstance lending ambiguity to the direction and purpose of the questioning," 475 Pa. at 23, 379 A.2d at 556, could supply the necessary evidence that the defendant knew of the occasion for the interrogation. Viewing the entire episode in context, we must agree with the conclusion of the trial judge that Lesko "was, in fact, advised of the seriousness of his situation and was aware that the police were not concerned

with the relatively minor charges." (Opinion, p. 44)

The Appellants claim that it was improper to admit testimony by James Henderson identifying them as two of three men he picked up and gave a ride to on January 3, 1980. The basis of this challenge is that Henderson had previously identified them from a photographic array. At the time of this photographic identification, the Appellants were in custody. The identification was conducted without the Appellants being represented by counsel.

In Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970), we held that a suspect in custody was entitled to have counsel present at a photographic identification, and that the absence of counsel would bar a subsequent in-court identification unless there was a showing that such identification had

an independent origin. The Commonwealth contends that Whiting does not survive United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). It has previously been suggested that Whiting was "undercut considerably" by Ash, Commonwealth v. Diggs, 260 Pa. Super. 349, 355 n. 5, 394 A.2d 586, 589 n. 5 (1978). It has also been suggested that to the extent Whiting expressed an interpretation of federal constitutional law, it did not survive Ash, although the state constitution, Article I, Section 9, might be given a broader sweep and require such a rule. Commonwealth v. Ray, 455 Pa. 43, 315 A.2d 634 (1974) (plurality opinion, Pomeroy, J.) Since the Ash decision, this Court has several times found it unnecessary to reach the issue whether the Pennsylvania Constitution requires that an accused be represented by counsel at a post-arrest

photographic identification. See, Commonwealth v. Holland, 480 Pa. 202, 389 A.2d 1026 (1978); Commonwealth v. Scott, 469 Pa. 258, 365 A.2d 140 (1976). We need not reach that issue in this case either. Assuming arguendo that the Appellants were entitled to, but did not have counsel present at the photo array, and therefore that the identification was improper, it does not necessarily follow that the identification must be suppressed. The law is clear that even when an improper pre-trial identification is made, an in-court identification is nevertheless admissible if it has sufficient, independent basis. Commonwealth v. Connolly, 478 Pa. 117, 385 A.2d 1342 (1978). Here, Henderson was with the appellants for thirty to forty-five minutes and was previously acquainted with Travaglia. This provided a

sufficient, independent basis for the in-court indentification.

Appellants next argue that their confessions were inadmissible because they were arraigned beyond the six-hour time limit set in Commonwealth v. Davenport, 471 Pa. 278, 370 A.2d 301 (1977). Appellants were arrested at 10:20 p.m. in the City of Pittsburgh. They were immediately informed of the charges against them and given the standard Miranda warnings of their rights. Once again after arrival at the police station, the Appellants were advised of the possible charges against them, told their rights, and both executed written waivers for their rights to remain silent and to have counsel present at further questioning. Lesko's interview began within twenty minutes of his arrest and continued, with short breaks for coffee, for approximately an hour and

a half. Travaglia likewise was interviewed for about an hour and a half after being detained for forty minutes in a holding cell. It is to be noted that the interviews involved discussion of at least four separate homicides, in addition to various other crimes charged, which had occurred over a period of seven days in three different counties. It is not surprising, then, that these initial interrogations spanned a relatively long period of time, Lesko's concluding at 12:20 a.m. and Travaglia's at 12:47 a.m.

After a pause of about ten or fifteen minutes, each Appellant then reiterated on tape the substance of the initial interviews as to each homicide discussed. With each of these taped statements requiring fifteen to twenty minutes, and with short breaks for food and rest, it was approximately 3:10 a.m.

when the interrogations were complete. The Appellants were arraigned in front of Allegheny County District Justice Martin McTiernan at 3:50 a.m., Lesko on charges of homicide and conspiracy, and Travaglia on the same charges along with an additional count of receiving stolen property. This was five and one-half hours after their arrest. Following this arraignment, around 4:15 a.m., the Appellants were returned to the Public Safety Building. They remained there until 4:35 a.m. when they were turned over to state police officers. They were arraigned in front of Westmoreland County District Justice Michael Moschetti at 5:55 a.m. in the County Courthouse in Greensburg, seven and one-half hours after their arrest.

In Davenport, this Court adopted "a rule under which the admissibility of any statement taken while the accused is

in custody before preliminary arraignment is based on the length of the delay between arrest and arraignment." 471 Pa. at 286, 370 A.2d at 306. Although stated as mandatory and without any explicit exceptions, the rule that "[i]f the accused is not arraigned within six hours of arrest, any statement obtained after arrest but before arraignment shall not be admissible at trial," Id. (emphasis added), admits of an implicit exception "[S]ix hours provides a workable rule which can be readily compiled with in the absence of exigent circumstances." Id., n. 7 (emphasis added)). Although the continuing vitality of the Davenport rule as a whole is subject to speculation after Commonwealth v. Blady, 492 Pa. 285, 424 A.2d 864 (1981) (Larsen J., dissenting, joined by Flaherty, J), and Commonwealth v. Bennett, 498 Pa. 656, 450 A.2d 970, 971-972 (1982)

(Flaherty, J. concurring, joined by Hutchinson, J.) [see also, Commonwealth v. Jenkins, 500 Pa. 144, 151, 454 A.2d 1004, 1008 (1982) (Concurring Opinion of McDermott, J.)], it is clear that a majority of this Court has recognized the implicit "exigent circumstances qualification." Commonwealth v. Keasley, 501 Pa. 461, 462 A.2d 216 (1983); Commonwealth v. Jenkins, 500 Pa. at 150, 454 A.2d at 1007 (1982).

After unraveling a tangled web of criminal activity, the Pittsburgh police were able to arraign the Appellants on homicide charges in Allegheny County within the six hours allowed by Davenport. We may take judicial notice of the approximately 40-mile distance between Pittsburgh and Greensburg, where the Appellants were arraigned on the homicide charges in the case at bar. If we are to require that arraignment take

place in the county in which jurisdiction for the crimes charged lies, it would be the height of folly to ignore the temporal and spatial realities which attend circumstances such as these, where arrest and arraignment occur a substantial distance apart. Cf. Commonwealth v. Dreuitt, 457 Pa. 345, 321 A.2d 614 (1974) (time necessary to transport defendant from place of arrest [Baltimore, MD] to Philadelphia not considered as part of unnecessary delay between arrest and arraignment, where defendant was advised of right to counsel and of charges against him at place of arrest) (O'Brien, J., announcing Opinion of the Court, joined by Eagen and Pomeroy, JJ.) We observe that except for the identity of the victims in the crimes charged, the Westmoreland County arriagnment provided the Appellants with no more information than the Allegheny

County arraignment had two hours previously. Under these circumstances, we find no error in the admission of the statements.

B. TESTIMONY AT TRIAL

Appellants allege that it was error for the trial court to allow a prosecution witness, Ricky Rutherford, to testify as to criminal acts of the Appellants, occurring just prior to the Miller homicide, which were not included in the crimes charged at bar.

Rutherford's testimony consisted of an account of how he had accompanied Lesko and Travaglia from the Edison Hotel in downtown Pittsburgh, where the Appellants had abducted one William Nicholls in his automobile; how Travaglia had shot Nicholls in the arm and then forced him to drive them out of town; how both Appellants had abused

Nicholls along the way; how they had driven to a lake and, after Rutherford helped them find a large rock, how Appellants had taken Nicholls down to the lake and returned to the car without him. Rutherford testified that the trio then went to Travaglia's father's house where they stole a .38 caliber pistol, and returned to the house and forced Rutherford to enter the garage to get other ammunition after they found the gun contained the wrong type. Rutherford then testified to their speeding past Officer Miller several times, and to the subsequent shooting of Miller by Travaglia.

The law is clear in Pennsylvania that evidence of other unrelated criminal conduct of an accused is generally inadmissible to prove his commission of the crime for which he is being tried. Commonwealth v. Styles, 494 Pa. 524, 431

A.2d 978 (1981); Commonwealth v. Brown, 489 Pa. 285, 414 A.2d 70 (1980); Commonwealth v. Peterson, 453 Pa. 187, 307 A.2d 264 (1973).

It is equally clear, however, that evidence of other crimes is admissible where it is relevant to prove (1) motive, (2) intent, (3) a common scheme or plan involving the commission of two or more crimes so closely related that proof of one tends to prove the other, (4) identity of the accused as the perpetrator, or (5) the absence of mistake or accident. Styles, 494 Pa. at 525-26, 431 A.2d at 980.

These exceptions are not to be applied in a vacuum, however. "Evidence of other offenses is subject, as is all relevant evidence, to exclusion of its probative value is outweighed by the 'danger that the facts offered may unduly arouse the jury's emotions of pre-

judice, hostility or sympathy.'" Commonwealth v. Terry, 462 Pa. 595, 603, 342 A.2d 92, 96 (1975) (dissenting opinion of Roberts, J.); Commonwealth v. Brown, 462 Pa. 578, 594, 342 A.2d 84, 92 (concurring opinion of Roberts, J., joined by Manderino, J.) See also, Fed.R.Evid. 403, 404(b); McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 185, at 438-39 (2d ed. E. Cleary 1972).

Our review of the record leads us to the conclusion that wile the possibility of prejudice existed, it was heavily outweighed by the probative value of Rutherford's testimony. The Appellants were advancing the theory that the shooting of Officer Miller was an accident, that Travaglia's finger had slipped from the gun's hammer. Viewing the facts of the Miller incident in isolation, this theory would be hard to refute.

The Commonwealth introduced Rutherford's testimony to show motive and intent. The details of the incidents which occurred just a short time prior to Officer Miller's shooting were developed to show that the Appellants were not just out to harass Miller that evening, but rather that they were in a stolen car, with the victim Nicholls' personal belongings and two firearms which could connect them to the prior wrongdoing.

Taken in this context, the facts elicited from Rutherford are so heavily related to and intertwined with the circumstances of Miller's killing that their evidentiary value greatly outweighs any possible prejudice suffered by the Appellants. Therefore, the trial court correctly allowed this testimony to be admitted.

Part of the arguments on this point merit a brief, separate discussion. According to this line of argument, the details of the Nicholls episode as testified to by Rutherford were so horrid as to inflame the passions of the jury and prejudice them against the Appellants during the sentencing phase of the trial and therefore were improperly admitted.

Whether the trial court in a capital case, in balancing the probative value of proffered evidence against its potentially prejudicial effect, must give separate considertion to the possible effect of the evidence at the sentencing phase, is a question which admits of no general answer. There may be circumstances where evidence, deemed admissible at trial because its relevance to the determination of guilt outweighs its possible prejudice, should nevertheless

be excluded because it is so inflammatory that its relevance to determination of sentence would be outweighed by its potential prejudice. Cf. Commonwealth v. Zettlemoyer, 500 Pa. 16, 53 n. 21, 454 A.2d 937, 956 n. 21 (1982) (conceivable that the reading of a "loaded" indictment to establish felony element of the aggravating circumstance that "the victim was a prosecution witness to a murder or other felony committed by the defendant. . .," 42 Pa. C.S. § 9711[d][5], could so inflame the jury that the possibility of prejudice would outweigh the evidentiary value of reading the indictment.). In most cases, however, the decision that the evidence is admissible for purposes of the guilt phase renders it, like all evidence admitted at trial, admissible for the penalty phase as part of the "circumstances" to be considered by the

jury. As long as there is no "embellishment" upon the facts or improper attempt by the prosecutor to dwell upon the inflammatory character of the evidence, no additional weight should be accorded to the potential for prejudice because such evidence might play a part in the sentencing determination. Where facts are relevant for a proper purpose at trial, defendants may not be heard to complain about the horrid character of such facts. To find otherwise would give rise to the perverse result that a capital defendant would benefit more, the more horrible the background circumstances were.

In the present case we find that Rutherford's testimony went uncontradicted. We also find that the prosecutor made minimal reference to this testimony in his closing at the guilt phase, and then only to the substance of

the testimony, not to the details. Furthermore, he made no reference at all to Rutherford's testimony or the details of the Nicholls episode in his argument at the penalty phase was made by counsel for appellant Travaglia. Upon thorough review of the record we find that the prejudicial effect of Rutherford's testimony was outweighed by its probative value in determining guilt, and was not exacerbated by its treatment in determining the sentence to be imposed.

Appellants also contend that they were prejudiced by Ruthford's testimony that their actions as to Nicholls seemed to him "like something they did all the time." In view of the record and the trial court's immediate cautionary instructions, the error, if any, was harmless beyond a reasonable doubt. Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978).

C. SENTENCING HEARING

The Appellants raise several allegations of error during the sentencing phase of their trial which, they argue, require suspension of the death penalties and imposition of life sentences.

The first of these allegations is that it was error of the court to allow into evidence as an aggravating circumstance the Appellants' guilty pleas to homicide charges in Indiana County arising out of the Nicholls incident. The statute provides that

> evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsection (d) and (e). Evidence of aggravating circumstance shall be limited to those circumstances specified in subsection (d).

42 Pa.C.S. § 9711(a)(2). One of the aggravating circumstances which may be considered is that

> [t]he defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

42 Pa.C.S. § 9711(d)(10). The Appellants argue that because sentence had not been imposed by the Indiana County Court, the guilty pleas were not final "convictions" for purposes of the statute and therefore should not have been considered as an aggravating circumstance. Appellants cite Commonwealth v. Zapata, 455 Pa. 205, 314 A.2d 299 (1974), as holding counsel ineffective for bringing up prior "convictions" where sentence had not been imposed, because such convictions were not grounds

for impeachment as they were not final. they also cite Commonwealth v. Myers, 485 Pa. 519, 403 A.2d 85 (1979). There we granted Appellants a new trial where the prosecutor had manipulated the court calendar to delay sentencing of a person found guilty of perjury, in order to prevent that person's being ruled incompetent to testify under the Disqualification Act, 19 P.S. § 62. And the Appellants cite generally Commonwealth ex rel. McClenachan v. Reading, 336 Pa. 165, 6 A.2d 776 (1939), wherein it was stated that

> [i]n interpreting a statute using the word 'conviction' the court has held that the strict legal meaning must be applied except where the intention of the legislature is obviously to the contrary.

336 Pa. at 169, 6 A.2d at 778. This "strict legal meaning", requires a verdict accompanied by sentence, and is to be contrasted with statutes wherein the

legislature uses the language "found guilty" to permit use of a verdict unaccompanied by a sentencing. See, e.g., Rosenthall v. State Board of Pharmacy, 3 Pa.Cmwlth. 621, 284 A.2d 846 (1971).

While this argument has superficial appeal, it must fail upon closer inspection. The clear import of the first part of subsection (d)(10) is to classify the commission of multiple serious crimes as one of the bases upon which a jury might rest a decision that the crime of which the defendant stands convicted, and for which they are imposing sentence, merits the extreme penalty of death. The purpose of the second part of subsection (d)(10) just as clearly is to classify the fact that the defendant was already serving a life sentence at the time he committed the offense at issue as another basis for such a decision. The first part of the

subsection allows as an aggravating circumstance the fact that "the defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable. . ." 42 Pa.C.S. § 9711(d)(10) (Emphasis added). The emphasized portion of the statute highlights the incongruity of the construction urged by the Appellants. By including offenses committed contemporaneously with the offense in issue, the legislature clearly indicated its intention that the term "convicted" not require final imposition of sentence, but cover determinations of guilt as well. Given the practical operation of the criminal justice system, a contemporaneous offense would either be tried together with the "offense at issue" or severed and tried separately. In the

former situation, it would be impossible for sentencing to have occurred prior to the jury's consideration of sentence on the "offense at issue"; in the latter, the vagaries of scheduling and conducting separate trials of a single defendant, within certain time limits and amidst the ordinary operation of a court calendar, would make it virtually impossible. At best, such factors would render it completely arbitrary whether a contemporaneous offense would qualify as an aggravating circumstance under subsection (d)(10).

We cannot accept the Commonwealth's argument that use of the word "imposable" would have been absurd if the Legislature had intended "convicted of" to mean that a finding of guilt had been made and sentence had been imposed. The prepositional phase "for which a sentence of life impriosnment was imposable"

refers back to, and is descriptive of, the offense which if the defendant has been "convicted" thereof may be considered an aggravating circumstance. Because the phrase modifies the noun "offense" rather than the verb "convicted", by itself it sheds no appreciable light on the shade of meaning to be attributed to the latter. We note, however, that the second part of subsection (d)(10), allowing as an aggravating circumstance that "the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense", appears to be co-extensive with the situation which would exist where a defendant has been found guilty and had a life sentence imposed. Were we to read the first part of the statute as the Appellants suggest, the second section would be surplus verbiage. Because the Legis-

lature is not presumed to have intended the provisions of its enactments as mere surplusage, Masland v. Bachman, 473 Pa. 280, 374 A.2d 517 (1977), the Appellants' position is untenable. For these reasons, we find that, as used in 42 Pa.C.S. § 9711(d)(10), the legislature evidenced a clear intent that "convicted" mean "found guilty of" and not "found guilty and sentenced."[1]

Appellants also put forward several allegations of improper argument by the prosecutor at the sentencing hearing. Lesko contends that the prosecutor exceeded the bounds of proper argument when he commented on Lesko's failure to show

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[1]Appellant Lesko has, in a separate appeal, No. 41 W.D. Appeal Dkt. 1982, raised a claim of ineffective assistance of counsel in the Indiana County case based on his attorney's advice to plead guilty. This matter is treated in a separate opinion filed this day and reported at 502 Pa. 511, 467 A.2d 307.

remorse. Lesko took the stand at the sentencing hearing and testified to details of his life history--the orphanages at which he stayed, the schools he attended, his service record--up until the time he first met Travaglia. The prosecutor did not cross-examine Lesko. In his argument to the jury, the prosecutor stated:

> John Lesko took the witness stand, and you've got to consider his arrogance. He told you about how rough it was, how he lived in hell, and he didn't even have the common decency to say I'm sorry for what I did. I don't want you to put me to death, but I'm not even going to say that I'm sorry.

(N.T. p. 1697).

Although Travaglia did not take the stand, and the prosecutor made no direct comment on his failrue to indicate remorse, he argues that the prosecutor's comments as to Lesko improperly implied

that he, Travaglia, had a burden to take the stand and show remorse.

Lesko cites cases for the proposition that when a defendant testifies as to a collateral matter, the prosecutor is not permitted to comment adversely upon his refusal to testify on the merits of the charge against him. See, e.g., Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971). The rationale for this rule is that such comment would run counter to the privilege against self-incrimination and the defendant's presumption of innocence. It is important to note that the argument complained of here was delivered during the sentencing phase of Appellants' trial. Lesko and Travaglia had already been tried and found guilty of first degree murder. The Commonwealth had been put to its proof and, without any infringement on the defendant's privilege against

self-incrimination, the presumption of innocence had been overcome beyond a reasonable doubt. We must keep in mind that the "sentencing phase" of the trial has a different purpose than the "guilt phase" and different principles may be applicable. For example, the privilege against self-incrimination in its pure form has no direct application to a determination of the proper sentence to be imposed; the purpose of the prosecutor is not to "incriminate," and the goal of the guilty defendant is not to avoid "incrimination." Likewise, the presumption of innocence which accompanies the accused throughout proceedings to determine his guilt has no direct application to the sentencing determination. This is reflected in the fact that the sentencing statute, without running afoul of the federal or state constitutions, places a burden on the

defendant of proving mitigating circumstances by a preponderance of the evidence. It may be acknowledged that in some sense there is a "presumption of life"--this from the fact that the "prosecution is limited to specified aggravating circumstances which must be proven beyond a reasonable doubt, while a defendant is permitted great latitude in demonstrating mitigating circumstances, and then by the lessser preponderance of evidence standard. This presumption, if it be called such, does not, however, support the reasoning or the rule which Appellants argue for excluding comment on the failure to show remorse.

It should not go unnoticed that the demeanor of a convicted defendant, including his apparent remorse, is a proper factor for consideration by the court in fixing sentence in noncapital

cases. We find no reason in policy or logic why the jury in a capital case, which is the sentencing authority, should be prevented from considering this same information. Had the prosecutor launched an extended tirade on this point, thereby focusing undue attention on the remorse factor, Appellants' claim of prejudice might have greater force. It is clear from examining the prosecutor's argument as a whole that he made only this single reference to remorse, which amounted to a suggestion that this was a factor which the jury should consider. We also note that the court in its charge instructed the jury that the defendants had no obligation to testify and that no adverse inference should be drawn from their failure to testify. We therefore find no error arising out of these comments.

The Appellants argue further impropriety in statements of the prosecutor which they characterize as calculated to arouse the prejudice and sympathy of the jury against them. Appellants first call attention to the prosecutor's statement:

> So I'll say this: Show them sympathy. If you feel that way, be sympathetic. Exhibit the same sympathy that was exhibited by these men on January 3, 1980. No more. No more.

(N.T., p. 1701).

It is axiomatic that a statement must be read in context in order to assess its propriety. We therefore set out at length the portion of the prosecutor's argument which immediately preceded the challenged statement:

> But I have a problem. Each one of you promised me, promised the judge, Mrs. Ambrose, Mr. Bertaini, Mr. McCormick, Mr. Marsh and the defendants, when we started, that you would follow the law. You all prom-

> ised that you wouldn't become a social activist. But I can't stop that. I can't stop you from walking out into that deliberation room after the judge charges you and saying to yourself, The Commonwealth has proved one or more aggravating circumstances, and there's no mitigating circumstances here at all, and the law says I must find these defendants and sentence them to death, but I won't do that, because I feel sympathy. And I also can't stop you from saying well, I found one or more aggravating circumstances that have been proven beyond a reasonable doubt, and although I found mitigating circumstances, the aggravating circumstances outweigh them, and the law says that I must return a death penalty, but I won't, I'm going to show sympathy. I just can't stop you from doing that.

Id.

It is clear from reading this argument as a whole that the prosecutor was seeking to remind the jury that sympathy was not a proper consideration, but that if they were inclined to be sympathetic they should temper their

sympathy. [This, in fact, was the essence of the trial court's instruction--that sympathy was not a factor to be considered in the jury's deliberations, that there was sympathy on both sides of the case. (N.T. p. 1706)]. This was not an improper argument for the prosector to have made.

Appellants argue further that the prosecutor erred in this statement by making reference to the victim. They cite Commonwealth v. Lipscomb, 455 Pa. 525, 317 A.2d 205 (1974); Commonwealth v. Cronin, 464 Pa. 138, 346 A.2d 59 (1975); and other cases wherein this Court has disapproved prosecutorial arguments which invite consideration of the murder victim. We observe that these cases all treat closing arguments made during trials for the purpose of determining guilt or innocence, where the defendant is still clothed with a

presumption of innocence. A large part of the reason why these arguments invoking the memory of the victim were disfavored was the prosecutor's implication of his personal belief in the guilt of the accused. See, e.g., Commonwealth v. Cronin. [Argument that "'[T]he only way you cannot find this defendant guilty of murder of the first degree is for [the victim] to walk through the door,'" 464 Pa. at 141, 346 A.2d at 61, disapproved as "'amount[ing] to a statement by the prosecutor that he was personally convinced that the appellant was guilty, and his innocence was as unlikely as the deceased's resurrection.'" Id., 464 Pa. at 142, 346 A.2d at 61, quoting from Commonwealth v. Lark, 460 Pa. 399, 404-405, 333 A.2d 786, 789 (1975)]. We again observe that the balance of principles which results in certain rules being appropriate at the "guilt

phase" of a trial may be struck differently at a hearing to determine appropriate penalty. The prosecutor's statement of his personal belief in the defendants' guilt can in no way be prejudicial where guilt has already been determined.

Prejudice might otherwise arise from reference to the victim if such reference has the effect of arousing the jury's emotions to such a degree that it becomes impossible for the jury to impose sentence based on consideration of the relevant evidence according to the standards of the statute. We find the statements of the prosecutor in this case to have made minimal reference to the victim. Indeed, the memory of both Leonard Miller and William Nicholls was first invoked by counsel for Appellant Travaglia ("And Leonard Clifford Miller is dead, and there's no question about

that. Mr. Nicholls is dead; there's no question about that. If the killing of Mike Travaglia can bring back those people, then there would be a legitimate reason for killing Mike Travaglia. Because then you bring back those people to their families, and you give something back; you create something from what you're doing. But you cannot do that." N.T. p. 1677).

Reading the arguments at the sentencing hearing as a whole, we find that the prosecutor's argument was carefully tailored to demonstrate the proof of aggravating circumstances, to refute the proof of mitigating circumstances, and to correct extraneous arguments introduced by the defense. We find no prejudice from the challenged statements making oblique reference to the victim.

Finally, we address Appellants' arguments that the prosecutor's final statement to the jury was inflammatory. The prosecutor stated, "Right now, the score is John Lesko and Michael Travaglia two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's your duty." Appellants characterize this statement as an improper appeal to vengeance which requires reversal of the death sentences. As we read the record, the arguments presented by defense counsel were to a large extent directed toward demonstrating that there was no rational reason for the existence of the death penalty, that it served no useful purpose. The prosecutor opened his argument by pointing out that the legislature in its lawmaking function had enacted the death penalty and had already decided that there is a rational

reason and that the penalty does serve a useful purpose. He returned to this theme, and prefaced the comment complained of by requesting "I want you to remember this: We have a death penalty for a reason." (N.T. p. 1701). The prosecutor is permitted, by the terms of the statute, to argue in favor of the death penalty. 42 Pa.C.S. § 9711(a)(3). Taken in context, we find the prosecutor's comment to have been no more than permissible "oratorical flair" in arguing in favor of the death penalty.[2]

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[2]The Appellants also allege other instances of error which, having carefully reviewed the record and the precedents, we must reject. Arguments that the exclusion of veniremen conscientiously opposed to the death penalty violates due process and the Appellants' right to a fair trial, and that the imposition of the death pentalty is "cruel and unusual" punishment, have been previously ruled upon by this Court. See Commonwealth v. Brown, 462 Pa. 578, 342 (footnote continued on next page)

III. PROPORTIONALITY REVIEW

Consistent with decisions of the United States Supreme Court, Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); prior decisions of this Court, Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied, ___

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[2](continued) A.2d 84 (1975), and Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), respectively. Arguments that the Appellants were denied their rights to speedy trial under the Federal and State Constitutions and Rule 1100, that the trial court erred in not quashing the information which charged both conspiracy and homicide, and the trial court erred in not charging the jury that they could find Lesko guilty of a different degree of murder than Travaglia, are without merit. No jurisprudential value would be served by further discussion of these points.

U.S. ____, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983); and the sentencing statute, 42 Pa.C.S. § 9711(h)(3)(iii), "this Court will conduct an independent evaluation of all cases decided since the effective date of the sentencing procedures under consideration (September 13, 1978)." Zettlemoyer, 500 Pa. at 62, 454 A.2d at 961. This review "will utilize all available judicial resources and will encompass all similar cases, taking into consideration both the circumstances of the crime and the character and record of the defendant in order to determine whether the sentence of death is excessive or disproportionate to the circumstances." Id.[3]

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[3]We note that the United States Supreme Court has granted certiorari to the Court of Appeals for the Ninth Circuit in the case of Pulley v. Harris, ___ U.S. ___, 103 S.Ct. 1425, 75 L.Ed.2d 787 (1983), decision below (footnote continued on next page)

Our research indicates that three cases in which "[t]he victim was a fireman, peace officer or public servant concerned in official detention. . . who was killed in the performance of his duties," 42 Pa.C.S. § 9711(d)(1), have proceeded to jury verdict under the Act of September 13, 1978. The cases are Commonwealth v. Benjamin Terry, Montgomery County Court of Common Please, Criminal Division, No. 1563-79, docketed on appeal with this Court, 80-3-595,

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[3](continued) reported sub nom. Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982). The questions presented for review are "(1) Does the Constitution, in addition to procedures whereby trial court and jury impose death sentence, require any specific form of 'proportionality review' by court of statewide jurisdiction prior to execution of state death judgment? (2) If so, what is the constitutionally required focus, scope, and procedural structure of review?"

argued April 19, 1983;[4] Commonwealth v. Edward McNeil, Philadelphia County Court of Common Pleas, Criminal Division, CP 80 Nov. 969-71; and Commonwealth v. Leslie Beasley, Philadelphia County Court of Common Pleas Criminal Division, CP 80 July 2175-2178.

In Terry, the defendant was an in-

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[4]On Appeal, this Court remanded the case for a new trial, 501 Pa. 626, 462 a.2d 676 (1983), because the lower court had improperly allowed the jury, during their deliberations, to have possession of a copy of a paraphrased, written version of the defendant's confession, a violation of Pa.R.Crim.P. 1114(a). We cannot, therefore, presently consider the case as having proceeded to jury verdict. We must note, however, that throughout much of our deliberation on the cases at bar, Terry was considered as a "similar case" for purposes of comparison. To the extent that our review for excessiveness or disproportionality involves determining whether or not juries generally, across the Commonwealth, find death to be an appropriate punishment for the crime, Terry has some limited value. Even if we remove Terry from consideration entirely, however, our conclusion remains unchanged.

mate serving three life sentences for murder. He was found guilty of first degree murder in the bludgeoning death of a guard at the State Correctional Institution at Graterford. The jury sentenced him to death. In Beasley, after finding him guilty of shooting an on-duty police officer, the jury sentenced the defendant to death. In McNeil, the defendant shot and killed a police officer who was at the scene where the defendant had been shooting at his wife and children. The jury convicted the defendant of first degree murder and imposed a life sentence.

We have searched the records of these cases available to this Court for information as to the character of the defendants (e.g. intelligence, family background, psychiatric history, previous criminal record), and the circumstances, both aggravating and

mitigating, of their crimes. We find that the sentence of death is not excessive or disproportionate to the penalty imposed in these similar cases. We also find that the evidence supports "the finding of an aggravating circumstance specified in subsection (d)," 42 Pa.C.S. § 9711(h)(3)(ii), and that the sentences were not "the product of passion, prejudice or any other arbitrary factor," 42 Pa.C.S. § 9711(h)(3)(i).[5] We

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[5]The Dissenting Opinion of Mr. Chief Justice Roberts reiterates his position in Zettlemoyer, 500 Pa. at 77-81, 454 A.2d at 969-971. That position, however, is based on two premises which, if subjected to careful analysis, must be considered faulty.

The first premise is that "the sentence imposed forecloses the availability of those subsequent [Post-Conviction Hearing Act] proceedings" which are available for appellants to challenge the effectiveness of counsel in "conventional" cases. Zettlemoyer, 500 Pa. at 79, 454 A.2d at 970. The authority cited for this proposition is 42 Pa.C.S. § 9711(i), paraphrased "record to be transmitted to (footnote continued on next page)

therefore must affirm the sentences of death.

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[5](continued) Governor at close of this Court's review." Id. The full text of this section, however, reads:

> Where a sentence of death is upheld by the Supreme Court, the prothonotary of the Supreme Court shall transmit to the Governor a full and complete record of the trial, sentencing hearing, imposition of sentence and review by the Supreme Court.

42 Pa.C.S. § 9711(i) (emphasis added). Contrary to the implication of the Dissent, the statute does not require that the official record be transmitted to the Governor. Nor does the statute in any other way, either expressly or impliedly, remove the case from the jurisdiction of the courts or prevent further action by the courts.

It is to be noted also that the Majority Opinion in Zettlemoyer contains a similar conclusory statement that "due to the final and irrevocable nature of the death penalty, the appellant wil have no opportunity for post-conviction relief wherein he could raise, say, an assertion of ineffectiveness of counsel. . ." 500 Pa. at 50 n. 19, 454 A.2d at 955 n. 19. Offered in support of the rationale for relaxing the waiver rule and considering issues raised for the first time before this Court or even raised sua sponte by this Court, the statement is clearly dictum.

(footnote continued on next page)

Nix, Justice, concurring.

I am fully in accord with the majority's affirmance of the verdicts of

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[5](continued)
The second premise of the Dissent in Zettlemoyer, quoted in the present Dissenting Opinion, is that "[u]ntil a hearing on counsel's effectiveness has been held, this Court cannot fairly state that it has discharged its statutory duty to provide a thorough review of the judgment of sentence of death." 500 Pa. at 81, 454 A.2d at 971. Although "thorough" is perhaps an appropriate general characterization of this Court's reviewing function in death penalty cases, it must not be overlooked that 42 Pa.C.S. § 9711(h) is quite specific in its description of this Court's duty in reviewing a sentence of death. Thus,

> (2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.
>
> (3) The Supreme Court shall affirm the sentence of death unless it determines that:
>
> (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
>
> (ii) the evidence fails to support the finding of an aggravating
> (footnote continued on next page)

guilt in these appeals. My concern is directed to the majority's disposition of the objection to the allowance into evidence as an aggravating circumstance of the appellants' guilty pleas to the homicide charges in Indiana County (the William C. Nicholls killing). The majority focused its analysis upon whether the term "convicted" as used in section 9711(d)(10), 42 Pa.C.S. § 9711(d)(10), requires the imposition of sentence be-

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[5](continued)
circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

(Emphasis added.) Although ineffectiveness of counsel might be classified as an "arbitrary factor" within subsection (3)(i), unless it is raised by the appellant or some hint of its presence is suggested by the record so as to cause this Court to raise the issue sua sponte, it is inconceivable how the issue can come before the Court on direct appeal.

fore such evidence can be admissible for this purpose.[1] In my judgement the issue raised is the finality of the conviction that is being offered as an aggravating circumstance. Where as here there have been challenges to the pleas entered in Indiana County,[2] I am con-

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[1]Section 9711(d)(10) provides:

> (d) Aggravating circumstances.- Aggravating circumstances shall be limited to the following:
>
> * * * * * *
>
> (10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

[2]Appellant Travaglia filed a motion to withdraw his guilty plea to the Indiana County charge on January 23, 1981, during the trial of the instant case. The motion was denied on April 30, 1981 and Travaglia was sentenced to (footnote continued on next page)

convinced that section 9711(d)(10) must be interpreted as providing for review by this Court of those claims prior to the execution of the judgments of sentence of death affirmed by the Court today. I therefore join in the Court's mandate today with the caveat that the death penalty will be carried out only after a review of those complaints by this Court and only if after such review

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[2](continued) a term of life imprisonment. There is no indication in the record whether an appeal was taken from that judgment of sentence.

Appellant Lesko initially filed a motion to withdraw his guilty plea in the Indiana County case on December 3, 1980, prior to the trial in Westmoreland County, and filed an amended motion to withdraw on April 13, 1981. His motion, as amended, was denied on June 5, 1981. Lesko's challenge to that denial was rejected, and he was sentenced on July 17, 1981 to a term of life imprisonment. Lesko appealed to the Superior Court, which transferred the appeal to this Court. In Commonwealth v. Lesko, 502 Pa. 511, 467 A.2d 307 (1983), this Court affirmed the judgment of sentence. Thus as to Lesko my concern expressed here is satisfied.

it is determined that the pleas were voluntarily and knowingly entered and the request for withdrawal was properly refused.

In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the United States Supreme Court painstakingly stressed the importance of the sentence-review function to be undertaken by the state's highest tribunal where the death penalty has been imposed. As noted by that Court in Zant v. Stephens, ___ U.S. ____, ____, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235, 255 (1983): "[A]though not every imperfection to the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." Surely an attack upon the validity of a guilty plea that

has been used as the basis for a finding of an aggravating circumstance constitutes the type of contention that must be reviewed before the execution of the capital sentence may be allowed.

An interpretation of section 9711(d)(10) which provides for such a final review by this Court of a challenge of this nature is also dictated by the law of this Commonwealth. Our Constitution mandates a right of appeal in all cases. Pa. Const. art. V, § 9; See Section 5105 of the Judicial Code, 42 Pa.C.S. § 5105. Moreover, our case law has recognized the qualitative difference between death and any other permissible form of punishment by relaxing rules of waiver which would otherwise preclude review of the merits of claims where the death sentence has been imposed. See Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982),

cert. denied sub nom. Zettlemoyer v. Pennsylvania, ___ U.S. ____, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983); Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978). In light of such precedent, it would clearly create an anomaly to foreclose a challenge upon the validity of a plea of guilty where that plea constitutes the aggravating circumstance upon which the death sentence is predicated.

It must be recognized that the validity of each aggravating circumstance is an important consideration even where there may be more than one aggravating circumstance upon which the jury could have reached its decision. Pennsylvania's death penalty statute provides that where the jury finds the existence of both aggravating and mitigating circumstances the jury must then engage in a "weighing" process. If,

after the weighing process, the jury determines that the aggravating circumstances outweigh the mitigating circumstances, it must return the death sentence. 42 Pa.C.S. § 9711(c)(iv). It is evident that this weighing process is squarely within the province of the jury and that a reviewing court cannot determine with any certainty the exact weight which the jury attached to each aggravating and mitigating circumstance.[3] In a case involving a decision as important as life and death we are not in a position to speculate about what decision the jury might have

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[3] See Williams v. State, 274 Ark. 9, 621 S.W.2d 686 (1982), cert. denied, ___ U.S. ___, 103 S.Ct. 460, 74 L.Ed.2d 611 (1983); Elledge v. State, 346 So.2d 998 (Fla. 1977); State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981) State v. Moore, 614 S.W.2d 348 (Tenn. 1981); Hopkinson v. State, 632 P.2d 79 (Wyo 1981), cert. denied sub nom. Hopkinson v. Wyo. 455 U.S. 922. 102 S.Ct. 1280, 71 L.Ed.2d 463 (1982).

reached had it not considered one particular aggravating circumstance. Therefore, if the validity of even one aggravating circumstance is in dispute,[4] the death sentence should not be executed until the resolution of that dispute has become final.

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[4]In the case of Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), the U.S. Supreme Court held that under a state statute which did not require this weighing process, and where no suggestion is made that the presence of more than one aggravating circumstance should be given special weight, the subsequent invalidity of one of the aggravating circumstances does not invalidate the death sentence. The court in Zant stated the following:

> [W]e note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty. Id. at _____, 103 S.Ct. at 2750, 77 L.Ed.2d at 258.

Moreover, in view of our statutory responsibility to thoroughly review the record in death penalty cases, the resolution of any such dispute within the jurisdiction of this Commonwealth must be made by this Court.[5] Such disputes need not be decided within the context of the death penalty appeal; for example, appellant Lesko's guilty plea challenge, lodged initially in the Superior Court, was decided by this Court in a separately briefed and argued

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[5]Where an aggravating circumstance such as a conviction in the court of another state or in federal court is at issue, such a dispute will be considered resolved when passed upon the highest court of that jurisdiction.

appeal.[6] However, where an appeal which has bearing on the validity of an aggravating circumstance relied upon in arriving at the death sentence is pending in another court of this Commonwealth at the time that sentence reviewed by this Court, at least that portion of such appeal which affects the efficacy of the aggravating circumstance should be certified to this Court for disposition. Where a proceeding which has given rise to a finding of an ag-

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[6]See footnote (2), supra. As noted in that footnote, the status of appellant Travaglia's guilty plea remains to be established. In light of this Court's pronouncement in Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied sub nom. Zettlemoyer v. Pennsylvania, ___ U.S. ____, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983); Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978), a sub- sequent challenge to the validity of that plea may not be assumed to be waived.

gravating circumstance is at the pre-sentencing stage, a direct appeal of this Court should be permitted upon sentencing. Until we have disposed of such related appeals this Court's statutorily mandated review of the death sentence is not complete and execution of sentence should be stayed.

ROBERTS, Chief Justice, dissenting.

Because appellants are presently represented by the same counsel who represented them at trial and at the death penalty hearing, there has been no meaningful inquiry into whether appellants have been afforded their constitutional right to the effective assistance of counsel. In the absence of such an inquiry, the reasons for counsel's strategy, which do not appear of record, cannot be known, and it cannot be determined whether there

existed evidence which should have been presented by counsel but was not.

Accordingly, the record should be remanded for the appointment of new counsel, who would be obliged to submit a petition to the court of common pleas addressing the effectiveness of trial counsel. As previously stated, "[u]ntil a hearing on counsel's effectiveness has been held, this Court cannot fairly state that it has discharged its statutory duty to provide a thorough review of the judgment[s] of sentence of death." Commonwealth v. Zettlemoyer, 500 Pa. 16, 77, 454 A.2d 937, 971 (1982) (Roberts, J., joined by O'Brien, C.J., dissenting).

90-1880

Supreme Court, U.S.
FILED
JUN 7 1991
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

JOHN CHARLES LESKO,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
VOLUME IV

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APPENDIX O

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN CHARLES LESKO

No. 681 C 1980

BEFORE: Gilfert M. Mihalich, J.
Joseph A. Hudock, J.
Daniel J. Ackerman, J.

COURT EN BANC

O P I N I O N

(Opinion by Gilfert M. Mihalich, J.)

In the above-captioned case, the Defendant, John Charles Lesko, was tried before a jury on charges of Criminal Homicide and Criminal Conspiracy to Commit Criminal Homicide. The Defendant was found guilty of murder in the first degree and criminal conspiracy. The jury imposed a death sentence on the

first degree murder conviction.

Defendant's counsel filed a "Motion for New Trial" setting forth fifty reasons. Counsel for the Defendant addressed thirteen of these reasons in his brief and in his oral argument. This Court will address these thirteen reasons.

Defendant's counsel also filed a "Motion in Arrest of Judgment" and a brief wherein it is alleged that the charges should be dismissed because of a violation of Rule 1100.

The reasons for requesting a new trial addressed by Defendant's brief and argued before this Court en Banc are as follows:

I. DURING THE PENALTY PHASE OF THE PROCEEDINGS, THE ASSISTANT DISTRICT ATTORNEY PRESENTED INFLAMMATORY ARGUMENT TO THE JURY. (Page 5 of this Opinion)

II. DEFENDANT'S DEATH PENALTY MUST BE VACATED BECAUSE VENIREMEN OPPOSED TO THE DEATH PENALTY WERE EXCLUDED FOR CAUSE IN VIOLATION OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968). (Page 9 of this Opinion)

III. DEFENDANT'S DEATH PENALTY MUST BE VACATED BECAUSE 18 PA. C.S.A. §1311 IS IN VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION. (Page 21 of this Opinion)

IV. DEFENDANT'S DEATH PENALTY MUST BE VACATED BECAUSE 18 PA.C.S.A § 1131 IS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION IN THAT IT PLACES THE

BURDEN OF PROVING MITIGATING CIRCUMSTANCES UPON THE DEFENDANT. (Page 25 of this Opinion)

V. EXCLUSIVE FOR CAUSE OF VENIREMEN WHO STATED THAT THEY WOULD AUTOMATICALLY VOTE AGAINST THE DEATH PENALTY VIOLATED THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE STATE AND FEDERAL CONSTITUTION. (Page 28 of this Opinion)

VI. EXCLUSION FOR CAUSE OF VENIREMEN WHO STATED THAT THEY WOULD AUTOMATICALLY VOTE AGAINST THE DEATH PENALTY VIOLATED APPELLANT'S RIGHT TO JURY TRIAL WHICH IS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION. (Page 28 of this Opinion)

VII. THE COURE ERRED IN PERMITTING THE COMMONWEALTH TO INTRODUCE AS AN AGGRAVATING CIRCUMSTANCE FOR SENTENCING, EVIDENCE THAT JOHN LESKO HAD ENTERED A PLEA OF GUILTY IN THE COURT OF COMMON PLEAS OF INDIANA COUNTY TO THE "SECOND DEGREE MURDER" OF WILLIAM NICHOLS, BECAUSE THAT PLEA WAS NOT A "CONVICTION," AS REQUIRED BY THE SENTENCING CODE. (Page 32 of this Opinion)

VIII. THE DEFENDANT WAS SUBJECTED TO AN ILLEGAL ARREST BY PITTSBURGH POLICE, AND DE- FENDANT'S REQUEST FOR SUP- PRESSION OF EVIDENCE SHOULD HAVE BEEN GRANTED. (Page 34 of this Opinion)

IX. THE "MIRANDA WARNING" ADMINISTERED TO THE DEFENDANT BY PITTSBURGH POLICE WAS INADEQUATE UNDER THE LAW BECAUSE THE DEFENDANT WAS NOT ADVISED THAT HE WAS A SUSPECT IN THE CRIMINAL HOMICIDE OF LEONARD CLIFFORD MILLER, AND THE USE OF THE CONFESSION AS EVIDENCE AT TRIAL VIOLATED THE CONSTITUTIONAL RIGHTS OF THE DEFENDANT. (Page 43 of this Opinion)

X. THE COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AFTER THE COURT SUBMITTED ITS INSTRUCTIONS TO THE JURY CONCERNING THE CHARGE OF CRIMINAL CONSPIRACY TO COMMIT MURDER. (Page 45 of this Opinion)

XI. THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER DEFENDANT'S OBJECTIONS, THE IDENTIFICATION TESTIMONY OF JAMES HENDERSON, WHICH EVIDENCE SHOULD HAVE BEEN SUPPRESSED FOR THE REASONS SET FORTH IN THE SUPPLEMENTAL MOTION TO SUPPRESS AND AT THE SUPPRESSION HEARING, THE IDENTIFICATION HAVING BEEN OBTAINED BY LAW ENFORCEMENT OFFICIALS IN VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO COUNSEL AND CONFRONTATION. (Page 50 of this Opinion)

XII. THE COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S POINTS FOR CHARGE BY WHICH THE JURY WOULD HAVE BEEN ADVISED THAT IT COULD FIND JOHN LESKO GUILTY OF A DIFFERENT DEGREE OF MURDER

THAN THE JURY MIGHT RETURN FOR MICHAEL TRAVAGLIA. (Page 54 of this Opinion)

XIII. THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER DEFENDANT'S OBJECTIONS, THE TESTIMONY OF RICKY RUTHERFORD, CONSISTING OF LEWD AND GRUESOME ACTS ON THE PART OF THE DEFENDANTS TOWARD WILLIAM NICHOLS PRIOR TO THE ALLEGED KILLING OF LEONARD CLIFFORD MILLER, WHICH EVIDENCE COMPRISED A SEPARATE AND ISOLATED EPISODE, TRANSACTION AND OCCURRENCE, AND INFLAMED THE PASSIONS OF JURY AGAINST THE DEFENDANT. (Page 55 of this Opinion)

* * * * *

I. DURING THE PENALTY PHASE OF THE PROCEEDINGS, THE ASSISTANT DISTRICT ATTORNEY PRESENTED INFLAMMATORY ARGUMENT TO THE JURY. (Defendant's first reason why a new trial should be granted.)

The alleged objectionable remarks by the Assistant District Attorney are as follows:

> "So I'll say this: show them sympathy. If you feel that way, be sympathetic, Exhibit the same sympathy that was exhibited by these men on January 3rd, 1980. No. more. No. more.
>
> "I want you to remember this: We have death penalty for a reason. Right now, the score is John Lesko and Michael Travaglia two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's your duty." (N.T. 1701-1702)

In evaluating the Defendant's objections to these remarks by the Assistant District Attorney, we must keep in mind

two important facts. The first is that these comments were made in the penalty phase of the trial; the jury had already decided that Mr. Lesko was guilty of Murder in the First Degree. Secondly, the function of the jury in this penalty phase of the trial is to determine the existence of aggravating or mitigating circumstances; and in accordance with the law, as outlined by the trial judge, to determine whether this Defendant's sentence shall be death or life imprisonment. Sympathy is not one of the aggravating or mitigating circumstances; however, counsel for Defendant-Lesko chose to interject the aspects of sympathy and alleged historical reasons for refuting the entire concept of a death penalty. He opened the door and the Assistant District Attorney delicately walked through this door. The Assistant District Attorney has a

right to try and remove from the jury's mind that which has been improperly implanted by defense counsel. (It is proper for prosecutor to respond to arguments advanced by defense counsel. Comm. v. Parente, 440 A.2d 549, 553 [1982]). In such circumstances, the Assistant District Attorney's effort must be limited to a reasonable response to the defense counsel's extrinsic evidence and comments. A review of the defense counsel's extrinsic evidence and comments will reveal that the Assistant District Attorney's comments were reasonable responses. These remarks did not hinder an objective weighing of the aggravating and mitigating circumstances, nor did they impede the rendering of a proper penalty under the circumstances.

Let us review some of the extrinsic evidence and comments interjected by de-

fense counsel. The Defendant, the mother of the Defendant and other relatives testified to his unfortunate and sympathetic childhood, i.e., abandonment by the mother, residence in orphanages, the fact that once some kids set fire to the Defendant. In his closing, defense counsel alluded to the historical development or underdevelopment of the death penalty. He contended that the death penalty had no beneficial effect on society and urged the jury not to impose the death penalty.

This evidence and argument by defense counsel went far beyond the purpose and scope of the penalty phase of the trial. It was calculated to inflame the sympathy of the jury and divert them from their assigned task of evaluating and balancing the aggravating and mitigating circumstances. It was designed to convince the jury that there is no

societal benefit or purpose in the imposition of a death penalty. In response, the Assistant District Attorney merely told the jury that they should temper the sympathy suggested by defense counsel's evidence and comments and told the jury that the imposition of the death sentence may have some societal purpose and benefit.

In looking at an overall perspective of all the closing arguments and the court instructions and considering that the above-quoted remarks of the Assistant District Attorney were responsive to issues interjected by defense counsel, this Court finds:

a. the remarks by the Assistant District Attorney did not hinder an objective weighing of the aggravating and mitigating circumstances, and

b. these remarks did not impede the rendering of a proper penalty under the circumstances.

For the above-mentioned reasons, the Defendant's first reason for a new trial does not warrant the granting of a new trial and is dismissed.

II. DEFENDANT'S DEATH PENALTY MUST BE VACATED BECAUSE VENIREMEN OPPOSED TO THE DEATH PENALTY WERE EXCLUDED FOR CAUSE IN VIOLATION OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968). (This is Defendant's second reason for a new trial.)

There is no question that the trial judge exerted every reasonable effort to empanel a fair and impartial jury within constitutional parameters including Witherspoon v. Illinois, supra. The trial judge made three separate efforts to select a fair, impartial jury. On

June 2, 1980, the trial judge attempted to select a jury in Westmoreland County. This effort was aborted because of extensive pre-trial publicity.

The second effort occurred on September 3-12, 1980 in Dauphin County. One hundred jurors were examined over a seven-day period. This process was aborted because a newspaper article, which alluded to four murders committed by the Defendants, was circulated in the jury assembly room. Because of the great possibility of prejudice to the Defendants, the trial judge granted Defendant's motion for mistrial. Seven jurors had been selected before the motion for mistrial was granted.

The third effort was successful. This jury selection process took place in Reading, Pennsylvania (Berks County). It took twelve days, starting on January 5, 1981 and concluding on

January 19, 1981. One hundred eighty-seven jurors were examined to select twelve jurors and four alternates. The law applicable to the number of peremptory challenges permitted in capital-punishment cases on January 5, 1981 is as follows:

> "(b) Trials Involving Joint Defendants:
>
> (1) In trials involving joint defendants, the defendants shall divide equally among them that number of peremptory challenges that the defendant charged with the highest grade of offense would have received if tried separately; provided, however, that each defendant shall be entitled to at least two (2) peremptory challenges. Where such division of peremptory challenges among join defendants results in a fraction of a peremptory challenge, each defendant shall be entitled to the next highest number of such challenges.
>
> (2) In trials involving joint defendants, it shall be within the discretion of the trial judge to increase the number of peremptory challenges to which each defendant is en-

titled up to the number of peremptory challenges that each defendant would have received if tried alone.

(3) In trials involving joint defendants, the Commonwealth shall be entitled to peremptory challenges equal in number to the total number of peremptory challenges given to all of the defendants." (Pa. Rule of Criminal Procedure 1126(b); effective August 1, 1980.)

Irrespective of the law relative to peremptory challenges applicable at that time, the trial judge announced, at the beginning of jury selection, that the Commonwealth would have twenty peremptory challenges and each Defendant would have twenty peremptory challenges. The bottom line of this ruling is that Commonwealth would only have twenty peremptory challenges, and the Defendants would have forty. (Under Rule 1126, both Defendants were entitled to a total of twenty, and the Commonwealth would be entitled to the total possessed by both

Defendants. According to the above-quoted rule, the Commonwealth was entitled to forty peremptory challenges, however, the Commonwealth was limited to twenty.) Each party was also granted one additional peremptory challenge for each two alternates to be selected. At the conclusion of selecting the first twelve jurors, the Commonwealth exercised nineteen peremptory challenges. Defendant-Lesko had utilized all twenty of his peremptory challenges. Defendant-Travaglia had utilized all twenty of his peremptory challenges. In selection of the alternates, the Commonwealth exercised one peremptory challenge; Defendant-Lesko used two; and Defendant-Travaglia used two. The fact that the Commonwealth did not use all of its peremptory challenges in selecting the first twelve jurors is relevant because if the trial judge would not have

granted the challenge for cause relative to Esther Kroh, the Commonwealth had an unused peremptory challenge. This would have resulted in the same jury being selected irrespective of the trial judge's ruling.

To insure that the questioning of the prospective jurors be conducted within constitutional limitations, the trial judge submitted a list of approved questions. These approved questions set the general parameters of the scope of inquiry. This list of approved questions has been admitted into the record as Court Exhibit No. 1. Those approved questions which relate to capital punishment are as follows:

> "16. Do you have any conscientious scruples against imposing the death penalty?
>
> a. (An affirmative answer will not be sufficient to sustain a challenge for cause. If the

juror answers in the affirmative, the juror should be asked the following question:

i. Are your feelings against the death penalty such that you would automatically vote against the imposition of such punishment irrespective of what evidence is presented and what law is given to you by the Trial Judge?

-or-

ii. ALTERNATIVE QUESTION: If in the trial of this case the evidence and the law establish that the death penalty should be imposed, could you participate in the imposition of the death penalty even though you have certain reserved feelings about the propriety of the death penalty?

ALTERNATE CAPITAL PUNISHMENT QUESTION:

16. Do you have any personal, moral or religious belief

or convictions against capital punishment?

a. (If prospective juror answers yes:)

Are these beliefs or convictions so firm that you would automatically vote against the imposition of the death penalty irrespective of any evidence or law presented to you in this trial?"

You will note that the above-quoted approved questions incorporate the mandates and guidelines expressed by our United States Supreme Court in Witherspoon v. Illinois (1968) 391 U.S. 510, 20 L.Ed.2d 776. A review of the transcript relative to jury selection will establish that in every instance the trial judge religiously followed these guidelines; therefore, Defendant's general allegation that venireman were excluded in violation of Witherspoon v. Illinois, supra, is without merit.

Defendant's brief specifically avers that:

> "In particular, the exclusion for cause of Ms. Kroh [N.T. 487] was in direct violation of Witherspoon. During the course of her examination, Ms. Kroh stated that she was 'opposed to the death penalty.' [N.T. 260] However, when the Court asked her whether she would refuse to participate in imposing the death penalty under any circumstances, she did not respond with an unequivocal affirmative answer but merely reiterated, 'Well, I am opposed, yes.' The Court then stated, "You're opposed to the death penalty.' and Ms. Kroh replied, 'Yes, sir.' [N.T. 261]" (PP. 6 and 7 of Defendant-Lesko's Brief)

The exclusion of Esther Kroh (the 19th prospective juror called) on Commonwealth's motion for cause was proper and her exclusion is based on two reasons: first, her inconsistent answers indicate that she either violated her oath or was unable to understand the questions that were asked. In either case, she was not qualified to serve as

a juror because all jurors must abide by their oaths; each juror must be willing to follow the law presented by the trial judge and each juror must be able to follow the law presented by the trial judge. A juror must assume her duty with such impartiality and comprehension that she will be able to consider all the testimony and instruction so that she could intelligently decide not only why and when a death sentence should not be imposed but also why and when it should be imposed.

Secondly, Ms. Kroh stated that she could not participate in imposing the death penalty irrespective of the evidence presented to her. This declaration disqualifies her as a juror in this case. The law of our Commonwealth provides for the imposition of the death penalty under certain circumstances. Consequently, her declaration indicates

she would violate the law of the Commonwealth and the oath of a juror to base her determination on the evidence and the law. Counsel for the Defendant contends that Ms. Kroh's answer was ambiguous. This writer, as the trial judge, neither heard nor observed any ambiguity to the following quoted question. The answer was a clear and emphatic, "Yes."

> "Q. THE COURT: Are you saying under all circumstances, that irrespective of what evidence was given to you, because you are opposed to the death penalty, you could not participate in imposing the death penalty upon somebody, irrespectfive of what evidence was given to you?
>
> A. Well, I am opposed, yes."
> [N.T. 261]

The trial judge had the opportunity to hear the emphasis placed on words; he had the opportunity to consider pauses between words. These are not discern-

ible from the record. He had the opportunity to observe the demeanor and facial expressions of the witness. The trial judge properly ruled that this prospective juror was not qualified to serve and properly granted the challenge for cause. The exclusion of Ms. Kroh does not violate the mandates established by Witherspoon v. Illinois, supra. Witherspoon does not prevent the exclusion of veniremen who would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial or those whose attitude toward the death penalty would prevent them from making an impartial decision as to the Defendant's guilt. To properly evaluate the trial court's decision, one must read Esther Kroh's comments taken in context of her entire examination. The

relevant portion of her testimony is as follows:

"EXAMINATION BY MR. GEARY:

Q. Good morning. What is your name?

A. My name's Esther Kroh....

Q. Do you have any conscientious scruples against imposing the death penalty?

A. No sir.

Q. In the event that either or both of the defendants in this case were convicted of murder in the first degree, it would be the responsibility of the jury at that point to then hear additional evidence and again be charged by the Court and deliberate again, and in deliberations they would determine whether or not those persons that had been convicted of murder in the first degree would be sentenced to either life imprisonment or to death. And that is the jury's function. Now, knowing that, if you were placed into that situation, would you automatically vote one way or the other irrespec-

tive of the evidence or the law that was given to you?

A. Well, I think I would vote either way.

THE COURT: You're saying you would vote on the evidence?

A. Yes....

Q. Would you give any greater weight to the testimony of a police officer witness as opposed to any other witness, simply and solely because the one person was a police officer?

A. No sir.

Q. Would you give any lesser weight to the testimony of a police officer witness, simply and solely because he was a police officer?

A. That question I don't think I'll be able to answer.

Q. Why is that?

THE COURT: Do you understand his question? Some of these questions are rather difficult, and you should carefully con-

sider them, but let me explain it to you this way.

Let's assume that you are selected as a juror, and one of the witnesses who comes and testifies and you listen to him is a police officer, and when he leaves the stand one of the other witnesses that comes up and testifies--that witness is not a police officer. But both of those witnesses--they testified about the same thing, and they were inconsistent, there were differences in their testimony. What Mr. Geary is asking you, would you give any lesser weight to the testimony of that first witness who is a police officer, simply because he was a police officer?

A. No, I would not.

MR. GEARY: This prospective juror is acceptable to the Commonwealth, Your Honor.

EXAMINATION BY MR. McCORMICK:
(Counsel for Defendant-Travaglia)

Q. The judge asked you about the weight you would give the testimony of a police officer, and I may have missed it. Let me just ask, if a--one person testified who was a police officer, and another person testified who was not, would you give greater weight or consider the testimony of the police officer more believable simply because that person was a police officer?

A. Well, in that case, I would say I would give preference. I understand that question better now. I think I would take the policeman's word for it.

THE COURT: Are you saying you would take the word of the policeman, simply because he's a policeman?

A. No, not because he's a policeman, but he's probably more educated, and knows the circumstances better than the other party.

THE COURT: Well then, you are saying

that you would give him greater weight because he's a policeman.

A. Well--

THE COURT: Or would you listen to the testimony--what Mr. McCormick wants to understand, or wants to know, whether or not you would give more weight to the testimony of a policemen as compared to the testimony of another person, and you're going to give that more weight simply because of the fact he was a policeman.

A. Not simply because he's a policeman. I would think he would be more--he'd know the circumstances better than the other individual.

Q. Well, let me ask this ma'am: as regards to the death penalty, should the jury return a verdict against either one or both of these defendants for first degree murder, are your feelings about the death penalty such that if you had to make a decision as to whether or not you

would impose the death penalty or impose a sentence of life, simply because the victim in this case was a police officer, would you then irrespective of the other evidence that you heard vote automatically for the death penalty?

A. No sir. I'm opposed to the death penalty.

MR. McCORMICK: This witness is acceptable to the defendant.

THE COURT: Are you saying under all circumstances, that irrespective of what evidence was given to you, because you are opposed to the death penalty, you could not participate in imposing the death penalty upon somebody, irrespective of what evidence was given to you?

A. Well, I am opposed, yes.

THE COURT: You're opposed to the death penalty?

A. Yes sir.

THE COURT: Mr. Marsh?

> MR. MARSH: She's acceptable.
>
> MR. GEARY: Please the Court, the Commonwealth would challenge for cause at this point....
>
> [N.T. 253-261; Emphasis supplied]

For the reasons set forth above, Defendant's second reason has no merit and is dismissed.

Reasons III, IV, V, and VI all relate to the constitutionality of the Pennsylvania capital punishment statute and will be addressed by the Court collectively. Reasons III, IV, V and VI are as follows:

> III. DEFENDANT'S DEATH PENALTY MUST BE VACATED BECAUSE 18 PA.C.S.A. § 1311 IS IN VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION. (The Sentencing Code, of which 18

Pa.C.S.A. § 1311 is a part, has been transferred to the Judicial Code and is currently found at 42 Pa.C.S.A. 9711.)

IV. DEFENDANT'S DEATH PENALTY MUST BE VACATED BECAUSE 18 PA.C.S.A. § 1311 IS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION IN THAT IT PLACES THE BURDEN OF PROVING MITIGATING CIRCUMSTANCES UPON THE DEFENDANT.

V. EXCLUSION FOR CAUSE OF VENIREMAN WHO STATED THAT THEY WOULD AUTOMATICALLY VOTE AGAINST THE DEATH PENALTY VIOLATED THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE STATE AND FEDERAL CONSTITUTION.

VI. EXCLUSION FOR CAUSE OF VENIREMEN WHO STATED THAT THEY WOULD

AUTOMATICALLY VOTE AGAINST THE DEATH PENALTY VIOLATED APPELLANT'S RIGHT TO JURY TRIAL WHICH IS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

The Defendant's brief and argument set forth the following specific reasons in support of the above-quoted general reasons:

a. The provision of the Pennsylvania death penalty statute which requires the jury to find the death sentence if they find one or more aggravating circumstances and no mitigating circumstances is in violation of the cruel and unusual punishment clause of the state and Federal Constitution. (Defendant's reason No. III)

b. The provision of the Pennsylvania death penalty statute which specifies that mitigating circumstances must be proved by the defendant by a preponderance of the evidence is a violation of the due process clause of the 14th

Amendment to the Federal Constitution. (Defendant's reason No. IV)

c. The exclusion of veniremen who stated that they would automatically vote against the death penalty is a violation of the cruel and unusual punishment clause of the state and Federal Constitution and the Defendant's right to a jury trial guaranteed by the Sixth and Fourteenth Amendments of the Federal Constitution. (Defendant's reasons Nos. V and VI)

Let us first address Defendant's contention that the provision of the Pennsylvania death penalty statute which requires a jury to impose a death sentence if they find one or more aggravating circumstances and no mitigating circumstances is cruel and unusual punishment, thus unconstitutional. The Defendant is alluding to the following provision of the Pennsylvania death penalty statute:

"(C)(IV) The verdict must be a

> sentence of death if the jury unanimously finds at least one aggravating circumstances...and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases." (42 Pa.C.S.A. 9711)

The United States Supreme Court has declared unconstitutional several mandatory death penalty statutes: WOODSON V. NORTH CAROLINA (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978; ROBERTS v. LOUISIANA (1976) 428 U.S. 325, 49 L.Ed.2d 974, 96 S.Ct. 3001 reh den 429 U.S. 890, 50 L.Ed.2d 173, 97 S.Ct. 248; WASHINGTON (1976) 428 U.S. 906, 49 L.Ed.2d 1213, 96 S.Ct. 3214 reh den 429 U.S. 890, 5 L.Ed.2d 174, 97 S.Ct. 248; ROBERTS V. LOUISIANA (1977, U.S.) 52 L.Ed.2d 637, 97 S.Ct. 1993, 5 Ohio Ops 3rd 252. All of the mandatory sentences that were declared unconstitutional were distinctly different from the Pennsyl-

vania death penalty statutes. Each of the unconstitutional statutes merely defined a specific crime or crimes and then made the death sentence mandatory. These statutes did not provide standards to guide the jury in its function of imposing a sentence. In declaring the mandatory death sentence in WOODSON V. NORTH CAROLINA, supra, unconstitutional, the United States Supreme Court stated that this statute provided no standards to guide the jury in its inevitable exercise of power to determine which first-degree murderer should live and which should die. The Court further stated that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense. The Court stated that these are consti-

tutionally indispensable parts of the process of inflicting the death penalty.

In declaring the death penalty statutes in the other cases unconstitutional, the United States Supreme Court basically expressed the same reasons and guidelines. In each of these cases the Court ruled that the unconstitutional statutes afforded no meaningful opportunity for considerations of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender.

The Pennsylvania death penalty complies with all the mandates and requirements outlined by the United States Supreme Court. The guidelines contained within the Pennsylvania Statute compel the jury to consider aggravating circumstances and mitigating circumstances in determining which first degree murderers

should live and which should die. The jury cannot impose the death sentence without considering aggravating and mitigating circumstances which relate to the character and record of the individual offender and the circumstances of the particular offense; the jury cannot impose the death sentence even under the mandatory aspects of the statute without finding that there were no mitigating circumstances. The Pennsylvania statute specifically provides aggravating circumstances and mitigating circumstances, thus compelling the jury into a meaningful consideration of the particular crime and the relevant attributes of the offender. A consideration of these factors minimizes the risk of wholly arbitrary and capricious action.

For the above-mentioned reason, Defendant's Reason No. III has not merit

and is dismissed.

Next let us consider Defendant's contention that the provision of the Pennsylvania death penalty statute which specifies that "mitigating circumstances must be proved by the defendant by a preponderance of the evidence" is unconstitutional. (Defendant's Reason No. IV)

Defendant's argument on this point and the cases cited by Defendant are completely out of perspective. One important fact ignored in Defendant's argument is that this burden on the Defendant is in the penalty phase of the trial. This is after the Defendant has been found guilty of first degree murder beyond a reasonable doubt. The Defendant no longer has a presumption of innocence.

The Pennsylvania death penalty statute requires the Commonwealth to prove the aggravating circumstances be-

yond a reasonable doubt. (The aggravating circumstances are the bad facts concerning the particular crime and the attributes of the offender.) This statute requires that the mitigating circumstances be proven by a preponderance of the evidence. (The mitigating circumstances are the good facts concerning the particular crime and the attributes of the offender.)

These procedural requirements are necessary to achieve justice and are constitutionally mandated. Justice is not a concept that can be achieved by arbitrary and capricious actions. It is not justice to the defendant to allow the jury to dream or imagine the existence of aggravating circumstances; it is not justice to society to allow the jury to dream or imagine the existence of mitigating circumstances. Justice demands a procedure which minimizes the

risk of the jury fabricating its findings or imagining the existence of facts for the purpose of imposing the death sentence or for the purpose of avoiding an unpleasant task like imposing the death sentence.

> "The instinct of retribution is part of the nature of man and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy--of self help, vigilante justice and lynch law." (FURMAN V. GEORGIA [1972] 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 reh den 409 U.S. 902, 34 L.Ed.2d 163, 93 S.Ct. 89.)

To properly understand the justness of this procedure we must understand the burden of "preponderance of the evidence." To prove a fact by a "preponderance of the evidence" is to prove

that the fact is more probably true than not. It is the tipping of the scales in favor of its existence to the slightest degree. This slight burden of proof is necessary to separate fact from fiction, dreams from reality; it minimizes the pitfalls of capriciousness and arbitrariness. A juror takes an oath that his or her determinations will be based upon the law and the evidence. To allow a juror to fabricate or dream up a mitigating circumstance or fact would be allowing that juror to violate his or her oath. To require proof of mitigating circumstances or facts by a measure less than a "preponderance of the evidence" is permitting such fabrications or dreams.

This burden of proof in death sentence statutes is constitutionally mandated. The United States Supreme Court in the landmark case of FURMAN V.

GEORGIA, supra, established a constitutional requirement for all death penalty statutes.

> "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious actions." (GREGG V. GEORGIA [1976] 428 U.S. 153, 49 L.Ed.2d 859 [at page 883], 96 S.Ct. 2909.)

Based upon the cases and rationale set forth above, this Court finds Defendant's reason No. IV to be without merit and it is dismissed.

The final constitutional objection by Defendant is that the exclusion of veniremen who stated that they would automatically vote against the death penalty is a violation of the cruel and unusual punishment clause of the state and federal constitutions and the Defen-

dant's right to a jury trial guaranteed by the Sixth and Fourteenth Amendments of the Federal Constitution. (Defendant's reasons Nos. V and VI)

Defendant's contentions, as expressed in reasons V and VI, never have been the law, are not the law and never will be the law of our land. To follow Defendant's argument (as expressed in his brief in Reasons V and VI) to its logical conclusion necessitates the acceptance of one or two false premises: that capital punishment, per se, is unconstitutional, OR, a juror may be the law unto himself.

Our entire concept of justice is based upon the fundamental principle that all jurors must base their decisions on the law of the land. To allow a juror to ignore the law is the threshold of anarchy.

It is not likely that capital punishment, per se, will ever be declared unconstitutional. The United States Supreme Court, in July, 1976, sustained the constitutionality of the death penalty and established the stability of capital punishment in the United States. Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909; Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960; Jurek v. Texas, 428 U.S. 262, 49 L.Ed.2d 929, 96 S.Ct. 2950.

In Gregg v. Georgia, supra, the United States Supreme Court stated:

> "The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. The common-law rule [428 U.S. 177] imposed a mandatory death sentence on all convicted murderers....
>
> It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified,

capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes. C 9, 1 Stat. 112 (1790). The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases:

> 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;...nor be deprived of life, liberty, or property, without due process of law...'

And the Fourteenth Amendment, adopted over three-quarters of a century later, similarly contemplates the existence of the capital sanction in providing that no State shall deprive any person of 'life, liberty, or property' without due process of law. "For nearly two centuries, this Court, repeatedly and [428 U.S. 197] often expressly, has recognized that capital punishment is not invalid per se....

Four years ago, the petitioners in Furman and its companion cases predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated. The petitioners in those cases said, in effect, that the evolutionary process had come to an end, and that standards of decency required that the Eighth Amendment be construed finally as prohibiting capital punishment for any crime regardless of its depravity and impact on society. This view was accepted by two Justices. Three other Justices were unwilling to go so far; focusing on the procedures by which convicted defendants were selected for the death penalty rather than on the actual punishment inflicted, they joined in the conclusion that the statutes before the Court were constitutionally invalid.

The petitioners in the capital cases before the Court today renew the 'standards of decency' argument, but developments during the four years since Furman have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large

portion of American society continues to regard it as an appropriate and necessary criminal sanction.

The most marked indication of society's endorsement of the death penalty for murder is the legislative response to Furman. The legislatures of at least 35 States have enacted new statutes that provide for the [428 U.S. 180] death penalty for at least some crimes that result in the death of another person...." (49 L.Ed.2d 816-878)

The United States Supreme Court also stated in Gregg v. Georgia, supra:

"In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." (49 L.Ed.2d 880)

and further:

"The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms

> of their own local conditions and with a flexibility of approach that is not available to the courts. Furman v. Georgia, supra, at 403-405, 33 L.Ed.2d 346, 92 S.Ct. 2726 (Burger, C.J., dissenting). In deed, many of the post-Furman statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.
>
> In sum, we cannot say that the judgment of the Georgia legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature [428 U.S. 187] to evaluate, in terms of its particular state the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe...." (49 L.Ed.2d 882)

Because Defendant's Reasons V and VI are based on false premises, they have no merit and are dismissed.

VII. THE COURT ERRED IN PERMITTING THE COMMONWEALTH TO INTRODUCE AS AN AGGRAVATING CIRCUMSTANCE FOR SENTENCING, EVIDENCE THAT JOHN LESKO HAD ENTERED A PLEA OF GUILTY IN THE COURT OF COMMON PLEAS OF INDIANA COUNTY TO THE "SECOND DEGREE MURDER" OF WILLIAM NICHOLS, BECAUSE THAT PLEA WAS NOT A "CONVICTION" AS REQUIRED BY THE SENTENCING CODE. (Defendant's seventh reason for new trial.)

The Defendant's seventh reason for a new trial pertains to Section 9711(d) of the Judicial Code (formerly 18 Pa.C.S.A. 1311(d). This section of the Sentencing Act enumerates the aggravating circumstances. The tenth aggravating circumstance is set forth in sub-paragraph (d)

and is as follows:

> "(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment of death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense." (Emphasis supplied) (42 Pa.C.S.A. 9711[d])

At the time of this trial, the Defendant had already pled guilty to second degree murder for killing William Nichols. At the time of this trial, the Defendant had not been sentenced to the mandatory sentence of life imprisonment for the murder of William Nichols. Second degree murder carries a mandatory sentence of life imprisonment. Defendant contends that it was error to submit to the jury the plea of guilty to the Nichols murder as an aggravating circumstance because the Defendant, as of that time, had not been sentenced.

Defendant contends that a plea of guilty before the formal imposition of the sentence is not a "conviction" within the definition of the tenth aggravating circumstance quoted above. This Court disagrees with Defendant's contentions. A plea of guilty in and of itself is a confession of guilt and is equivalent to a conviction and verdict of guilty by a jury. (See Comm. v. Maroney, 425 Pa. 411, 229 A.2d 913 (1467); United States ex rel Crosby v. Brierley, 404 F.2d 790, 797 (1968). (The Defendant's contention presents the following interesting query: Is a jury's verdict of guilty not a conviction until the sentence is imposed?)

The plea of guilty to the Nichols murder in Indiana County meets the criteria and requirements as specified in aggravating circumstance No. 10 quoted above.

1. The Nichols murder was committed by the Defendant before the Miller murder;

2. At the time of the Miller trial, the Defendant had pled guilty to second degree murder for the killing of Nichols;

3. A sentence of life imprisonment was imposable at the time of Defendant's plea to second degree murder for killing Nichols. In fact, life imprisonment is the only sentence that could have been imposed in the second degree murder plea of guilty.

For the reasons set forth above, Defendant's Reason No. VII is dismissed.

VIII. THE DEFENDANT WAS SUBJECTED TO AN ILLEGAL ARREST BY PITTSBURGH POLICE, AND DEFENDANT'S REQUEST FOR SUPPRESSION OF EVIDENCE

SHOULD HAVE BEEN GRANTED. (Defendant's eighth reason for new trial.)

The Defendant contends that his arrest by the Pittsburgh police was illegal; and, therefore, the evidence obtained as a result of that arrest, particularly his statement to the police, should be suppressed. There is no dispute concerning the facts of the arrest which took place in a Pittsburgh hotel room on January 3, 1980, at 10:25 p.m. At the time of the arrest, the police officers possessed a warrant for the arrest of Michael Travaglia on the charge of receiving stolen property. Entry to the room was made with the aid of the night clerk who unlocked the door to the Defendant's room with a passkey, and the police neither announced their identity or purpose before entering. The officers found both defendants in

the room, and John Lesko pointed a handgun at the officers before surrendering. The Defendant argues that the police conduct described above violates R.C.P. 2007 and 2003(c). Both rules deal with the execution of search warrants, but we will, for the sake of argument, accept their contention that they are applicable to the present situation. Rule 2007 provides that law enforcement officers must give notice of their identity and authority to the occupant of the premises prior to attempting a forcible entry. Rule 2003(c) precludes the execution of a warrant after 10:00 p.m. absent affidavits showing justification for the nighttime entry. We note, however, that Rule 2007 requiring notice before entry specifically states that the officer need not give such notice if "exigent circumstances require his immediate

forcible entry." We believe that if there are exigent circumstances that would eliminate the need for notice under Rule 2007 that such circumstances would more than justify the abrogation of the nighttime entry requirements of R.C.P. 2003(c). We accept the Defendant's contention that the occupants of a hotel room are entitled to protection against unreasonable searches and seizures, Stoner v. California, 376 U.S. 483, 11 L.Ed.2d 856, 84 S.Ct. 889 (1964), and that absent exigent circumstances, a person may not be arrested in their time for a felony without a warrant, Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980). There is, however, no authority precluding the police from a warrantless arrest in a suspect's home or hotel room where exigent circumstances exist. While there is no absolute test as to

what constitutes exigent circumstances, the Pennsylvania Supreme Court, in Comm. v. Williams, Pa. 396 A.2d 1177 (1978), has adopted the guidelines set forth by the federal court in Dorman v. United States, 140 U.S. App. D.C. 320, 435 F.2d 385 (1970):

> "Terms like 'exigent circumstances' or 'urgent need' are useful in underscoring the heavy burden on the police to show that there was a need that could not brook the delay incident to obtaining a warrant, and that it is only in the light of those circumstances and that need that the warrantless search meets the ultimate test of avoiding condemnation under the Fourt Amendment as 'unreasonable.' While the numerous and varied street fact situations do not permit a comprehensive catalog of the cases covered by these terms, it may be useful to refer to a number of considerations that are material, and have particular pertinence in the case at bar.
>
> First, that a grave offense is involved, particularly one that is a crime of violence....

Second, and obviously interrelated, that the suspect is reasonably believed to be armed. Delay in arrest of an armed felon may well increase danger to the community meanwhile, or to the officers at the time of the arrest....

Third, that there exists not merely the minimum of probable cause, that is requisite even when a warrant has been issued, but beyond that a clear showing of probable cause, including 'reasonably trustworthy information' to believe that the suspect committed the crime involved.

Fourth, strong reason to believe that the suspect is in the premises being entered.

Fifth, a likelihood that the suspect will escape if not swiftly apprehended.

Sixth, the circumstances that the entry, though not consented, is made peaceably....

Another factor to be taken into account, though it works in more than one direction, relates to time of entry - whether it is made at night...." Commonwealth v. Williams, supra, at 1179, 1180.

It is incumbent upon us to measure the facts and circumstances as known to the arresting officers and supported by the record against the guidelines referred to above in order to make a determination as to whether or not exigent circumstances were present that would justify the warrantless entry into the Defendants' hotel room. Before, however, we apply an item-by-item analysis, it is necessary that we review the circumstances known to the police at the time of the arrest.

Between December 27, 1979 and January 3, 1980, three unsolved homicides occurred in Westmoreland County. On December 27, 1979, Peter Levato was shot to death by a .22 caliber weapon. On January 1 or January 2, 1980, Marlene Sue Newcomer was also killed by a .22 caliber weapon; and on January 3, 1980, Patrolman Leonard Miller was shot to

death with a .38 caliber revolver. During approximately the same period of time there were a series of armed robberies involving convenience stores located in Westmoreland and Indiana Counties. In each of these robberies the victims were tied at the scene by the robbers who used yellow electrical wire to bind them. Bernard Travaglia, the father of the Defendant, Michael Travaglia, informed the Pennsylvania State Police that a spool of yellow electrical wire had been stolen from him along with a .38 caliber revolver. Mr. Travaglia indicated to the police that he suspected his son, Michael, of stealing the revolver; and an inspection of Michael Travaglia's truck, which had been repossessed by the Leechburg Bank, revealed to the police yellow electrical wire similar to that which had been stolen from Bernard Travaglia and which

had been used in the robberies referred to above. Mr. Travaglia also advised the police that his son, Michael, did possess a .22 caliber pistol and that Michael had advised him that the gun had been recently confiscated by a game warden. A check with the Pennsylvania Game Commission by the State Police did not reveal any such incident of confiscation. Further, the victims of a hold-up at a Seven-Eleven store in Indiana County reported to the police that when they were robbed on January 1, 1980, they were tied with yellow electrical wire and that they observed the robbers flee the scene in a tan Dodge Ram Charger with window curtains. A similar vehicle was thereafter discovered in a Pittsburgh parking garage containing the body of Marlene Sue Newcomer.

On January 3, an arrest warrant was issued against Michael Travaglia for receiving stolen property relative to a burglary at Sonny's Lounge on Route 22 in Delmont, Westmoreland County. It was known that Michael Travaglia and an unknown individual were then staying at the Thatcher Motel which was located next to Sonny's Lounge. Peter Levato's car had been found abandoned on December 29, 1979, within one mile of the Thatcher Motel.

In regard to the Miller homicide, the police knew that the windows in the escape vehicle had been shot out and that three men were known to be hitchhiking from the area of the homicide in the general direction of Pittsburgh. One of the men was believed to be bleeding, and a motorist who had given a ride to a similar trio, knew one of the hitchhikers, Michael Travaglia,

by name. The police subsequently learned that a Michael Simons, an alias which Michael Travaglia was known to have used, and a Mr. Lesko had rented Room 616 in the Edison Hotel in Pittsburgh.

The police also contacted Daniel Keith Montgomery, a person they had reason to believe had been rooming with Michael Travaglia at the Thatcher Motel in Delmont. Mr. Mongtomery was located by the police at a restaurant across the street from the Edison Hotel and he had in his possession a .38 caliber revolver and ammunition. Montgomery explained to the police officers that he had received the revolver from Michael Travaglia who was then across the street with John Lesko in Room 616 of the Edison Hotel. Montgomery related that Travaglia had informed him that he was giving Montgomery the gun because the gun had been

used in the shooting of a police officer. Montgomery advised the police as well that there was a .22 caliber revolver still in Lesko's possession.

The police then determined from the night clerk at the hotel that the occupants of Room 616 were still in their room and then made their entry as referred to above.

We will compare this factual situation with the considerations discussed in Comm. v. Williams, supra.

1. A grave offense was involved. The police had sufficient information to make Michael Travaglia a suspect in three homicides committed within a six-day period. In addition, the police were aware that Michael Travaglia had told Daniel Keith Montgomery that he had shot a police officer.

2. The suspect was reasonably believed to be armed. When Montgomery was questioned by the police, he informed them that he had seen Lesko and Travaglia

in the hotel room only a few minutes before and that Lesko was in possession of a .22 caliber pistol.

3. There was a clear showing of probable cause to believe that the suspects had committed a crime. The police were aware that a .38 caliber revolver had been stolen from Bernard Travaglia and that Daniel Keith Montgomery had surrendered a similar weapon to the police, relating to them that the weapon had been given to him by Travaglia because he had used it to shoot a police officer. This information coupled with the fact that wire of the type used in several robberies (including one in which the robbers fled in a vehicle similar to the one in which Mrs. Newcomer's body was found) was found in the truck owned by Travaglia and repossessed by the bank and Travaglia's presence and departure from the general area in which Patrolman Miller had been shot provided clear probable cause for the arresting officers.

4. There was strong reason to believe that the suspects were in the premises being entered. This, of course, was verified by Montgomery's statement that he had seen the suspects in Room 616 of the Edison Hotel only minutes before and the information provided by the night clerk who eventually admitted the officers into the suspects' room.

5. There was a likelihood that the suspects would escape if not swiftly apprehended. As already indicated, Montgomery had already told the police that Travaglia had told him that he had "shot a cop" and that he had given him the .38 caliber revolver and ammunition to dispose of the same. Such actions were clearly consistent with an attempt to rid himself of incriminating evidence and to evade detection for the crimes that had been committed. The fact that the suspects were not at their permanent residence and that Travaglia had registered under an alias was sufficient to warrant the conclusion that the suspects were attempting to avoid detection and were likely to leave at any

time. In short, there is no reason to believe that the suspects would, in fact, stay throughout the night.

6. Without question, the entry into the hotel room was made forcibly without warning or notice and was, as indicated before, done during the night. The brief on behalf of the defense places great emphasis on the fact that the defendants were on the sixth floor of the hotel and that there was no evidence that there was any avenue of escape open to them except through the corrdor outside their room. They, therefore, argue that the proper procedure for the police to have followed would have been to place a guard in the corridor to insure that the defendants did not leave their room while other officers went before a magistrate to obtain an arrest warrant. We believe that such a procedure would have placed the lives of the police officers and the defendants in jeopardy. The police were well aware that the occupants of the room were armed and capable of desperate acts. To follow the procedures

> suggested by the defense would have invited a shootout in the event that the defendants attempted to leave the room. We cannot agree that the officers are required to put themselves in such perilous position.

We conclude, therefore, that the circumstances present here were so urgent as to justify a warrantless arrest.

It should also be noted that the police at the time of the arrest were in possession of a valid arrest warrant issued against Michael Travaglia, albeit on a charge of receiving stolen property, and that the pointing of the handgun at the police officers by John Lesko upon their entry into the room constituted an offense committed in the presence of the officers, thereby providing additional justification for his arrest.

Based upon the facts surrounding the arrest of the Defendant and Michael Travaglia, and the legal precedent cited

above, this Court finds that the arrests were legally permissible because of exigent circumstances. Consequently, the evidence obtained as a result of those arrests, particularly the statements given to the police, are admissible at the time of trial.

For the reasons mentioned above, Defendant's eighth reason for a new trial has no merit and is dismissed.

IX. THE "MIRANDA WARNING" ADMINISTERED TO THE DEFENDANT BY PITTSBURGH POLICE WAS INADEQUATE UNDER THE LAW BECAUSE THE DEFENDANT WAS NOT ADVISED THAT HE WAS A SUSPECT IN THE CRIMINAL HOMICIDE OF LEONARD CLIFFORD MILLER, AND THE USE OF THE CONFESSION AS EVIDENCE AT TRIAL VIOLATED THE CONSTITUTIONAL RIGHTS OF THE DEFENDANT. (De-

fendant's ninth reason for new trial.)

The Defendant, Lesko, contends that although he was given his Miranda warnings by the Pittsburgh police prior to making his inculpatory statement, that his waiver of his Fifth Amendment rights was invalid inasmuch as at the time he made the waiver he was not aware that he was a murder suspect, but rather believed that he was being questioned concerning the charge of violation of the Uniform Firearms Act and assault arising out of his apprehension at the Edison Hotel. It is true that a waiver of rights will not be valid if the police have disguised the purpose of their interrogation, Commonwealth v. Richmond, Pa. 320 A.2d 351 (1974); Commonwealth v. Collins, Pa. 259 A.2d 160 (1969); Commonwealth v. Dickson, Pa. 379 A.2d 553 (1977). But the contention of Mr. Lesko

is simply not supported by the record. He was, in fact, advised of the seriousness of his situation and was aware that the police were not concerned with relatively minor charges. At the suppression hearing, Detective Amity testified as follows:

> "Q. After you filled out this pre-interrogation warning form, what did you do?
>
> A. Well, we advised him of the charges that we arrested him for.
>
> Q. What were those?
>
> A. Violation of the Uniform Firearms Act and the Recklessly Endangering Another Person. And we also told him that he was a suspect in several murders that happened and wanted to talk to him about those.
>
> Q. After you told him this, what was the next thing that happened?
>
> A. He was more than willing to tell us about everything that he did." (Suppression hearing transcript, page 558.) (Emphasis supplied)

It is apparent that Mr. Lesko's contention in this area is without merit; therefore, Defendant's ninth reason for new trial is dismissed.

X. THE COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AFTER THE COURT SUBMITTED ITS INSTRUCTIONS TO THE JURY CONCERNING THE CHARGE OF CRIMINAL CONSPIRACY TO COMMIT MURDER. (Defendant's tenth reason for a new trial.)

In his brief, Defendant contends that Rule No. 228(a) of the Criminal Rules of Procedure precludes the joinder of criminal homicide (which includes murder) and criminal conspiracy. Defendant further contends that since the Defendant was tried on the charges of criminal homicide (including murder) and criminal conspiracy, this was a violation of Rule No. 228(a), thus necessi-

tating the granting of a new trial.

The Defendant's position on this point is specifically set forth on page 45 of his Brief:

> "The violation of this Rule by the District Attorney, and the failure of the Court to provide relief to the Defendant prior to trial on this point, is a denial of procedural due process of law, requiring a new trial."

Rule 228(a) of the Criminal Rules of Procedure is as follows:

> "When murder is alleged in an information no other counts may be joined in the information except voluntary and involuntary manslaughter.

This Court disagrees with the Defendant's position. Neither Rule 228(a) nor the joinder of criminal homicide and conspiracy <u>in this case</u> has anything to do with "procedural due process of law." In this particular case, the Defendant is not entitled to a new trial because the Defendant was not prejudiced

by the joinder of the two charges. A new trial is not warranted for the following reasons:

1. In this particular case, the individual trials on the charge of criminal homicide of Leonard Clifford Miller and the charge of criminal conspiracy to commit criminal homicide of Leonard Clifford Miller would entail a duplicate presentation to the jury of exactly the same evidence. The primary purpose of joinder of offenses is to serve the goal of trial economy and convenience by insuring that the acts or transactions supporting the crimes charged need only be proven once (See U.S. v. Borish, 452 F.Supp. 518 (1978).

In the case at bar, the joinder of the criminal homicide and criminal conspiracy did not result in any

prejudice or injustice. On the other hand, the consolidation provided judicial economy. The guidelines for permissive joinder have been set forth in the case of Comm. v. Morris, 425 A.2d 715 (1981). These guidelines are hereinafter set forth and it is to be noted that the consolidation of the criminal homicide and criminal conspiracy, in the case at bar, falls within the prescribed guide- lines.

> "The traditional justification for permissible joinder of offenses or consolidation of indictments appears to be the judicial economy which results from a single trial. The argument against joinder or consolidation is that where a defendant is tried at one trial for several offenses, several kinds of prejudice may occur: (1) The defendant may be confounded in presenting defenses, as where his

defense to one charge is inconsistent with his defenses to the others; (2) the jury may use the evidence of one of the offenses to infer a criminal disposition and on the basis of that inference, convict the defendant of the other offenses; and (3) the jury may cumulate the evidence of the various offenses to find guilt when, if the evidence of each offense had been considered separately, it would not so find. Commonwealth v. Lasch, 464 Pa. 573, 585, 347 A.2d 690, 696 (1975); Commonwealth v. Peterson, 435 Pa. 187, 194, 307 A.2d 264, 267 (1975); Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964). Thus in arriving at a meaningful standard to guide the trial court in its exercise of discretion, and to permit appellate courts to determine whether the trial court abused this discretion, we must weigh the possibility of prejudice and injustice caused by the consolidation against the consideration of judicial economy." (425 A.2d 717, 718)

2. Rule 228(a) is not of constitutional dimension. Its provisions are not related to, nor do they affect, due process. This is evident from the fact that the Supreme Court of Pennsylvania has rescinded the rule as of July 1, 1982 (See Order of Dec. 11, 1981, Supreme Court of Pennsylvania No. 103, Criminal Procedural Rule, Docket No. 2.)

3. To justify a granting of a new trial, the Defendant must show that the joinder prejudiced the rights of the Defendant. It has long been the law of our Commonwealth that the propriety of consolidating separate indictments or charges for trial is ultimately within the sound discretion of the trial court, and its determination in this regard will not be disturbed unless it

clearly appears that the rights of the defendants were prejudiced. The burden of showing a clear injustice to the defendant is a heavy one. (See Comm. v. Peterson, 307 A.2d 264, 267 (1973); Comm. v. Hill, 388 A.2d 689 (1978); Comm. v. Vickers, 394 A.2d 1022 (1978); Comm. v. Tolassi, 392 A.2d 740 (1978); Comm. v. Morris, 391 A.2d 653 (1978); Comm. v. Fiorni, 390 A.2d 774 (1978); U.S. v. Niederberger, 580 F.2d 63 (1978); Comm. v. Morris, 425 A.2d 715 (1981.)

4. In cases such as this, where two co-defendants committed three separate murders in Westmoreland County within a few days, judicial expediency and economics are serious factors. The legal disposition of

the three murders and several robberies committed by these defendants totally dominated the judicial activities in the Westmoreland County courts for the past two years. The judicial proceedings relative to these charges will cost the taxpayers approximately a quarter of a million dollars. To sever the criminal homicide and criminal conspiracy charges would have doubled the required judicial time and cost.

5. Comm. v. Campana, 452 Pa. 233, 304 A.2d 432 (1973), vacated and remanded, 414 U.S. 803 (1973), on remand 455 Pa. 622, 314 A.2d 854 (1974) and Rule 110 of the Pennsylvania Rules of Criminal Procedure mandate that all charges resulting from a criminal "episode"

of each defendant should be consolidated at one trial. The Campana case, supra, holds that a violation of this mandate could preclude subsequent prosecution of the "same episode offense" as a violation of the Double Jeopardy Clause of the Fifth Amendment. Thus, Campana mandates the joinder of the criminal homicide and criminal conspiracy charges in this particular case.

For the above-mentioned reasons, this Court holds that the Defendant-Lesko was not prejudiced by the joinder of the criminal homicide charge and the criminal conspiracy charge; therefore, the Defendant is not entitled to a new trial and his tenth reason for new trial is dismissed.

XI. THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER DEFENDANT'S

OBJECTIONS, THE IDENTIFICATION TESTIMONY OF JAMES HENDERSON, WHICH EVIDENCE SHOULD HAVE BEEN SUPPRESSED FOR THE REASONS SET FORTH IN THE SUPPLEMENTAL MOTION TO SUPPRESS AND AT THE SUPPRESSION HEARING, THE IDENTIFICATION HAVING BEEN OBTAINED BY LAW ENFORCEMENT OFFICIALS IN VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO COUNSEL AND CONFRONTATION. (Defendant's eleventh reason for a new trial.)

Counsel for the Defendant contends that the exhibiting of photos to an identification witness, while Defendant was in custody, without the Defendant or his counsel being present, makes the in-court identification improper. Defense counsel cites Comm. v. Whiting, 439 Pa. 205 (1970) as legal precedent

sustaining his position.

This Court finds that the trial judge did not commit error in admitting into evidence the identification testimony of James Henderson. This Court has considered the following factual circumstances in arriving at its decision. These factual circumstances emphatically refute Defendant's position:

1. At the time the photographic displays were shown to James Henderson by Detective DelleDonne, no comments or suggestions were made that would lead him to select one photograph over any other.

2. When the two photographic displays were shown to James Henderson on January 7, 1980, he identified the pictures of John Lesko and Michael Travaglia as being two of the three individuals he drive from

Plum Borough to McKeesport on the morning of January 3, 1980.

3. James Henderson identified Michael Travaglia as an individual whom he had known for a period of ten years. It was because of this close association with Michael Travaglia that James Henderson agreed to give Defendant-Lesko and Defendant-Travaglia a ride from Plum Borough to McKeesport on the morning of January 3, 1980. This was shortly after the Defendants abandoned the Lancia automobile, which was stolen from William Nichols.

4. Mr. Henderson had the opportunity to closely and clearly observe Defendant-Lesko for approximately one-half hour. During this period of time, Mr. Henderson held casual conversations with both

defendants.

5. There is a considerable amount of evidence other than the testimony of James Henderson to establish that Defendants, Lesko and Travaglia, were with Mr. Henderson at the time in question.

All of the above-mentioned facts emphatically and conclusively establish that Mr. Henderson's identification testimony relative to Defendant-Lesko was based on seeing and talking with Defendant-Lesko shortly after the killing of Officer Miller and not upon the photos exhibited to the witness by the county detective.

There is one legal reason which totally refutes Defendant's position. Defendant relies on Comm. v. Whiting, supra, which is based upon the United States Supreme Court case, U.S. v. Wade, 388 U.S. 218 (1967). The holding of

these cases was that the Sixth Amendment created the right of the Defendant's counsel to be present at a display of photos to an identification witness when the defendant was in cus- tody. However, the United States Supreme Court, in U.S. v. Ash, 413 U.S. 300, 37 L.Ed.2d ___ (1973), retreated from this position and states:

> "...the Sixth Amendment does not grant the right of counsel at photographic displays conducted by the government for the purpose of allowing a witness to attempt an identification of the offender..." (Id. at 413 U.S. 321)

Clearly, the holding in Comm. v. Whiting, supra, is no longer viable in light of the decision in Ash, supra. This very obvious possibility was considered by Mr. Justice Pomery in his concurring opinion in Comm. v. Claitt, 454 Pa. 313, 311 A.2d 925 (1973) wherein

he stated:

> "I concur in the decision of the Court. I deem it appropriate to add, however, that the Supreme Court of the United States has recently held that, 'The Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender.' United States v. Ash, 413 U.S. 300, 37 L.Ed.2d 619 (1973). Insofar as our opinion in Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970), held to the contrary, therefore, it can no longer be considered to be an accurate statement of federal constitutional law...."

It is to be noted that the facts and conclusions of this Court are consistent with the extensive Findings of Fact and Conclusions of Law of Judge Daniel J. Ackerman who conducted the suppression hearings in this case. His findings, conclusions and Order of Court were handed down on October 3, 1980.

For the reason that the Defendant's Reason No. 11 cannot be sustained legally or factually, it has no merit and is dismissed.

XII. THE COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S POINTS FOR CHARGE BY WHICH THE JURY WOULD HAVE BEEN ADVISED THAT IT COULD FIND JOHN LESKO GUILTY OF A DIFFERENT DEGREE OF MURDER THAN THE JURY MIGHT RETURN FOR MICHAEL TRAVAGLIA. (Defendant's twelfth reason for a new trial.)

A review of the trial court's charge in its entirety clearly establishes that the jury could have found John Lesko guilty of a different degree of murder than the jury's finding for Michael Travaglia.

Counsel for John Lesko vigorously argued to the jury that they should find

John Lesko guilty of second degree murder. In regarding the trial judge's entire charge, a second degree murder conviction of John Lesko was a viable verdict irrespective of the jury's finding of first degree murder for Michael Travaglia. The trial judge accurately defined the various degrees of murder, voluntary manslaughter and involuntary manslaughter.

After providing a lengthy and specific definition of all types of criminal homicide, the trial judge again reviewed the distinctive characteristics of all the types of criminal homicide. The trial judge then reviewed the possible verdicts the jury could find for each of the defendants. The trial judge submitted separate verdict slips for each defendant and clearly indicated each possible verdict for each of the defendants.

Within the perameters described in the trial judge's charge, the jury could have found John Lesko and Michael Travaglia guilty of different degrees of murder.

Since the Court's charge is in conformity with the Defendant's suggested Point for Charge, the trial judge's refusal to read the suggested Point for Charge cannot be the basis for a new trial. Therefore, the Defendant's twelfth reason for a new trial has no merit and is dismissed.

XIII. THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER DEFENDANT'S OBJECTIONS, THE TESTIMONY OF RICKY RUTHERFORD, CONSISTING OF LEWD AND GRUESOME ACTS ON THE PART OF THE DEFENDANTS TOWARD WILLIAM NICHOLS PRIOR TO THE ALLEGED KILLING OF LEONARD CLIFFORD

MILLER, WHICH EVIDENCE COMPRISED A SEPARATE AND ISOLATED EPISODE, TRANS ACTION AND OCCURRENCE, HAD INFLAMMED THE PASSIONS OF THE JURY AGAINST THE DEFENDANT. (Defendant's thirteenth reason for a new trial.)

The Defendant contends the trial court committed reversible error by allowing the Commonwealth to introduce evidence that the Defendant murdered William Nichols several hours before the shooting of Officer Miller. Defendant contends that the evidence of the other murder is not proof of the commission of the murder in question and that the evidence of another distinct crime is so prejudicial that it strips the Defendant of the presumption of innocence.

During the presentation of the Commonwealth's case, Commonwealth proposed

to introduce evidence which established that the Defendant murdered three other persons within a period of several days. Commonwealth proposed to introduce evidence of the fact that Defendant-Lesko also murdered Levato, Newcomer and Nichols. It was the contention of the Commonwealth that these crimes were admissible because they showed a plan, scheme and design. Commonwealth further contended that the Nichols murder was admissible for another reason in that it established a motive and intent to kill Officer Miller. As noted in the record, the Court carefully weighed the prejudice caused by the introduction of the other murders and the probative value of the proposed evidence. The trial judge permitted the Commonwealth to introduce evidence of the Nichols murder; however, did not permit the introduction of evi-

dence relating to the Levato and Newcomer murders. To properly evaluate the trial court's ruling, one must understand the sequence of events surrounding the killing of Officer Miller.

On December 27, 1979, defendants picked up Peter Levato in the Edison Hotel area of downtown Pittsburgh. They held him at gunpoint, took him in his car to Westmoreland County, beat him, robbed him, and finally one of the defendants shot him in the back of the head with a .22 caliber gun, which Defendant-Travaglia had obtained from a friend. This occurred either late on December 27, or early on December 28, 1979. Levato's car was then abandoned by defendants.

A few days later in the early morning hours of January 1, 1980, defendants, while hitchhiking, were picked up by Marlene Sue Newcomer, who was return-

ing from a New Year's Eve Party in Vandergrift to her home in Fayette County. After taking over her van they tied her up, robbed her and several hours later Defendant-Lesko shot and killed her with the same .22 gun which was used to shoot Peter Levato. This occurred in Westmoreland County on Route 22 near its intersection with Route 66. Later, the same day, the van and body of Marlene Sue Newcomer were abandoned by the defendants in Gimbels' parking lot in downtown Pittsburgh.

Less than two days later in the early morning hours of January 3, 1980, defendants, accompanied by Ricky Rutherford, picked up William Nichols in the Edison Hotel area in downtown Pittsburgh and took him and his car (a Fiat Lancia) to Indiana County. On the way, the defendants beat and robbed him and once there threw him into Blue Spruce Lake.

Defendants left Indiana County in Nichols' car which also had Nichols' wallet in it. Defendants went to Westmoreland County to Defendant-Travaglia's parents' home where they burglarized the garage and stole a .38 caliber handgun. Defendants left and returned a second time to Defendant-Travaglia's parents' home where they committed a second burglary to get bullets for the .38.

The Defendants then proceeded to Apollo in Armstrong County. There, at approximately 4:45 A.M., Defendant-Travaglia, who was driving Nichols' car (Defendant-Lesko in front on the passenger side and Ricky Rutherford in rear), saw a police car in front of the Apollo Seven-Eleven, decided "to have some fun and aggravate the cop" and sped past it and drove up the hill. When there was no response from the police car, Defen-

dant sped past a second time thinking the police car couldn't follow them across the county line (which was at the mid-point of the bridge going out of Apollo). The second time the police car gave chase and Defendant-Travaglia stopped the Lancia at the bottom of the hill in Westmoreland County. Leonard Miller stopped and approached the Lancia. Defendant-Travaglia recognized him by name and by sight. Fearing apprehension by a police officer who knew Travaglia; being in the stolen car of aman they had beaten, robbed and thrown into a lake by tying a large rock around his body, all within two hours prior to this; having in the car the wallet of the dead man; and finally, possessing the .22 caliber gun, which had been the murder weapon in the Levato and Newcomer murders, Defendant-Travaglia shot and killed Leonard Miller

by shooting him two times as Leonard approached the Lancia. Defendants sped away and abandoned the Lancia within a few minutes and began to walk. When the car was found, Nichols' wallet was inside.

Therefore, during the period from the late evening hours of December 27, 1979, through 4:53 A.M. on January 3, 1980, (a period of five days and nine hours) the Defendants brutally murdered four people.

The general rule of law is that the evidence of another distinct crime, not charged in the indictment, cannot be introduced against the defendant since the fact of one crime is not proof of the commission of another, and the evidence of another distinct crime is so prejudicial that is strips the defendant of the presumption of innocence. There are certain recognized exceptions to this

general rule. Evidence of other distinct crimes are admissible where they are relevant to prove: motive; intent; a common scheme or plan involving the commission of two or more crimes so closely related that proof of one tends to prove the other; the identity of the accused as the perpetrator; accident or lack of mistake; and when the two crimes are part of the "same transaction" or "res gestae." This legal precedent has recently been set forth by the Pennsylvania Supreme Court in the case of Comm. v. Styles, 431 A.2d 978 (1981) at page 980:

> "It is well settled that evidence of other unrelated criminal conduct of an accused is generally inadmissible to prove his commission of the crime for which he is being tried. Commonwealth v. Brown, 489 Pa. 285, 414 A.2d 70 (1980); Commonwealth v. Peterson, 453 Pa. 187, 307 A.2d 264 (1973). As we have stated:

> ' "[t]he purpose of this rule is to prevent the conviction of an accused for one crime by the use of evidence that he has committed other unrelated crimes, and to preclude the inference that because he has committed other crimes he was more likely to commit that crime for which he is being tried. The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty, and thus effectually to strip him of the presumption of innocence." '
>
> "...It is equally settled, however, that evidence of other crimes is admissible where it is relevant to prove (1) motive, (2) intent, (3) a common scheme or plan involving the commission of two or more crimes so closely related that proof of one tends to prove the other, (4) the identity of the accused as the perpetrator, (5) accident or (6) lack of mistake. Commonwealth v. Brown, supra."

The trial judge properly excluded the murders of Levato and Newcomer. They had attributes of being a part of a plan, scheme and design in that they

were committed with the same .22 caliber pistol; they were committed within a few days of each other; and were committed in the same county. The murders of Levato and Newcomer were excluded because they were not so closely related that proof of one tended to prove the other. This disassociation is not applicable to the Nichols and Miller murders. Officer Miller was killed within two hours from the time William Nichols was killed. The killings took place within several miles of one another. The Defendants were in the process of leaving the area where they killed Nichols when they murdered Officer Miller. The Defendants were, in fact, in the automobile they stole from Nichols when they shot Officer Miller. Officer Miller was shot by the Defendants as they were leaving the scene of the Nichols murder. These two

crimes were so related that the proof of the Miller murder naturally incorporated proof of the Nichols murder.

The proximity of time and distance between the Nichols and Miller murders, the fact that Miller was killed as the Defendants were leaving the Nichols' murder site, make the two events a part of a chain of events. The Nichols murder is a part of the history of the Miller murder; it is a part of the natural development of the facts. For these reasons the facts surrounding the Nichols murder were admissible as the "same transaction" or "res gestae" exception.

> "Next, appellant objects to the admission at trial of evidence relating to the events which let up to the killing of Bogier, and also the sequel to the killing. The argument is that such evidence, concerning as it did other crimes allegedly committed by appellant, was admitted for the sole purpose of showing appellant's

criminal disposition. We do not agree that such evidence was inadmissible. While it is true that generally evidence of crimes other than the one for which the defendant is being tried is not admissible, there are certain well-defined exceptions to that rule. Among these is the 'same transaction' or 'res gestae' exception. McCormick, Evidence, § 190 at 448 (2d ed. 1972). In Commonwealth v. Williams, 307 Pa. 134, 160 A. 602 (1932), this Court spelled out that exception, saying that such evidence is admissible where 'such prior conviction or criminal act formed a part of a chain, or was one of a sequence of acts, or became part of the history of the event on trial, or was part of the natural development of the fact.' Id. at 148, 160 A. at 607. See also Commonwealth v. Ross, 413 Pa. 35, 195 A.2d 81 (1963); Commonwealth v. Wable, 382 Pa. 80, 84, 114 A.2d 334, 336 (1955). We believe that the evidence of the other events, sordid as they were, was admissible under this exception because they were part and parcel of the violent rampage which resulted in the death of William Bogier; they were necessary to complete the picture of the day in question, not to prove Brown's criminal disposition in general. No error was committed in permitting the full story,

> of which the murder was an integral part, to be told." (Comm. v. Brown, 342 A.2d 84, 90 [1975])

The most important probative factor is that the admission of the Nichols murder was relevant to prove motive and intent to kill. Before the introduction of evidence relating to the Nichols murder, the evidence presented to the jury indicated that Officer Miller was shot for no apparent reason. In his confession to the police, Defendant-Travaglia stated that his thumb slipped on the hammer causing the unintentional shooting of Officer Miller.

There are several important pieces of evidence that could refute Defendant's contention of an accidental and unintentional shooting of Officer Miller and which could give reason to what otherwise was an unexplained killing of

a policeman. These pieces of evidence are as follows:

1. At the time Officer Miller stopped the Defendants, the Defendants were in a unique sportscar that they had just stolen from their previous victim, Mr. Nichols.

2. The time and distance between the Nichols murder and the Miller murder were relatively short.

3. At the time Officer Miller stopped the Defendants, they had in their possession the wallet of Mr. Nichols and the .22 pistol they used to kill Levato and Newcomer.

4. Initially, when the Defendants observed Officer Miller, they merely intended to lure him away from the store so the Defendants could rob that store.

5. As Officer Miller approached the Lancia sportscar, Defendant-Travaglia recognized Officer Miller by name and sight. They grew up in the same area. After recognizing Officer Miller, Defendant-Travaglia shot him twice.

Assuming the above to be factual, the otherwise unexplained irrational and alleged unintentional shooting of a police officer becomes an intentional, self-serving murder. Officer Miller had to die because he knew Michael Travaglia and observed Michael Travaglia in the presence of the other Defendant in a unique sportscar that was stolen from their recent murder victim. They also had in their possession the murder victim's wallet and a .22 caliber pistol used to kill two other victims, Levato and Newcomer. If Officer Miller had lived, he would undoubtedly have connec-

ted the Defendant with the Nichols murder, thus a possible motive for intentionally killing Officer Miller was to prevent that possible association.

It is reasonable to assume that because of the close association between Officer Miller and Defendant-Travaglia, that Officer Miller would recognize Defendant-Travaglia. If Officer Miller continued to live, it is reasonable to assume that Officer Miller would become aware of the Nichols murder and the fact that he owned a unique sportscar (Lancia), which was probably taken by his murderers. If Officer Miller continued to live, it is reasonable to assume that he would direct the finger of attention and suspicion to the occupants of the Lancia. If Officer Miller was killed then and there, he could not point the finger of attention of suspicion to the Defendant's relative to

the Nichols murder.

The evidence surrounding the Nichols murder was very critical to the Commonwealth in its burden of proving the intention to kill; it was important in establishing a possible motive for the killing of Officer Miller; and it was extremely relevant to negate the accidental slipping of the thumb on the hammer of the murder weapon.

Evidence of the William Nichols murder was properly admitted by the trial judge for the following reasons:

a. Evidence of the Nichols murder was relevant in proving motive; this probative value far outweighs the prejudice of introducing evidence of another crime.

b. Evidence of the Nichols murder was relevant in proving intent to kill; this is an essential element of first degree murder and outweighs

the prejudice of introducing evidence of another crime.

c. The Miller murder grew out of, or was caused by, the fact that the Defendants shortly before brutally murdered William Nichols.

d. The Nichols murder and the Miller murder are parts of the history of each other; they are part and parcel of the natural development of the facts of the same transactions.

e. "Additionally, evidence tending to show efforts on the part of the accused to destroy or dispose of incriminating evidence is admissible to show consciousness of guilt. See Commonwealth v. Robson, 461 Pa. 615, 337 A.2d 573 (1975)." (Commonwealth v. Soli, 417 A.2d 216, 219 (1979])

Counsel for Defendant further alleges that the introduction into evi-

dence of how William Nichols was killed was so prejudicial that it outweighed any probative value, thus necessitating a new trial.

This writer totally disagrees with these allegations. The manner in which William Nichols was killed was essential to prove motive. If the Defendant and Michael Travaglia had accidentally killed William Nichols, there would be a lesser need to kill Officer Miller than if they had brutally and intentionally killed William Nichols.

Another important factor of admissibility of how the Defendant and Michael Travaglia killed William Nichols is that these events were part and parcel of the violent rampage which resulted in the death of Officer Miller. (It is reasonable to conclude that the killings of Levato and Newcomer were also part of the same violent rampage, however, these

killings were more remote in time and place.) The events of how William Nichols was killed were necessary to complete the picture of the day in question, not to prove Lesko's criminal disposition in general. (Evidence of the killing of Levato and Newcomer would fall in this latter category.) The events of how William Nichols was killed are interwoven probative threads that blend into and become an integral part of the picture of why Officer Miller was killed. Some of these interwoven probative threads are:

The Nichols killing and the killing of Officer Millere were committed by Defendant-Lesko and Michael Travaglia within approximately two hours of one another; Officer Miller was killed while these defendants were leaving the scene of the Nichols killing and they were on their way back to Pittsburgh; Officer

Miller was killed while they were in this last victim's (Nichols') sportscar (the Defendants had just stolen the car from William Nichols); the Defendants also had in their possession Nichols' wallet and the .22 caliber pistol used to kill Levato and Newcomer; because Officer Miller and Michael Travaglia knew each other, it was reasonable to assume that Officer Miller was a potential link between the brutal killing of William Nichols and the individuals in his unique sportscar.

The events surrounding the killing of William Nichols and Officer Miller were very close in proximity of time and place. The circumstances surrounding these killings indicate a high probability that the killing of Officer Miller grew out of, and was caused by, the prior set of facts and circumstances relating to the Nichols murder. All of

these facts and circumstances, sordid as they were, were admissible under the "same transaction" or "res gestae" exception.

> "In Commonwealth v. Williams, 307 Pa. 134, 160 A. 602 (1932), this Court spelled out that exception, saying that such evidence is admissible where 'such prior conviction or criminal act formed a part of a chain, or was one of a sequence of acts, or became part of the history of the event on trial, or was part of the natural development of the facts.' Id. at 148, 160 A. at 607. See also Commonwealth v. Ross, 413 Pa. 35, 195 A.2d 81 (1963); Commonwealth v. Wable, 382 Pa. 80, 84, 114 A.2d 334, 336 (1955). We believe that the evidence of the other events, sordid as they were, was admissible under this exception because they were part and parcel of the violent rampage which resulted in the death of William Bogier; they were necessary to complete the picture of the day in question, not to prove Brown's criminal disposition in general. No error was committed in permitting the full story, of which the murder was an intergral part, to be told." (Comm. v. Brown, supra.)

The evidence of HOW Nichols was killed is highly probative to prove motive. Because the jury could determine from the evidence submitted to them that Officer Miller was intentionally killed to eliminate him as a possible link between the Defendants and the brutal killing of Nichols, the manner in which Nichols was killed is highly probative to establish motive and the intent to kill Officer Miller.

The manner in which the Defendants killed Nichols established the nature and type of crime committed by the Defendants in killing Nichols. If Nichols was killed during a struggle, it may indicate voluntary manslaughter; if Nichols was killed when he fell out of the automobile, it may indicate involuntary manslaughter or accident; if he was shot in the arm and then drowned in a lake by putting stones in his shirt and

pushing him under the water, it may indicate first degree murder. The more serious the crime and the more brutal the circumstances, the greater the likelihood that the jury would conclude the Defendants intended to kill the potential link between these acts and the Defendants. The more serious the crime and the more brutal the circumstances, the greater the likelihood the jury would conclude that Officer Miller was intentionally killed to keep him from pointing the finger of association and suspicion to the Defendants' sordid acts.

The prejudice of HOW the Nichols' murder was committed is in direct proportion to its probative value in establishing intent to kill and motive. If Defendants had accidentally killed Nichols, there would be less desire on their part to kill Officer Miller; if

the Defendants killed Nichols during a struggle, there would be a greater desire by Defendants to kill Officer Miller; if the Defendants killed Nichols in a brutal manner, there would be even a greater desire by Defendants to kill Officer Miller and prevent a revelation of such unconscionable and sordid acts on their part.

For any one of the several reasons, set for above, evidence of the Nichols case was admissible in the Miller murder trial; therefore, Defendants's thirteenth reason is without merit and is dismissed.

* * * * *

Defendant, John Lesko, filed a Motion in Arrest of Judgment and assigned the following reason in support of his Motion:

DEFENDANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL UNDER THE CONSTITUTIONS

OF THE UNITED STATES OF AMERICA AND THE COMMONWEALTH OF PENNSYLVANIA, AND AS PROVIDED BY PA.R.CRIM.P. 1100.

Defendant's Motion in Arrest of Judgment is based upon an alleged violation of Rule 1100 of the Pennsylvania Rules of Criminal Procedure. The Defendant's Motion in Arrest of Judgment is denied because there was no violation of Rule 1100. The trials relative to the above-captioned case were called to trial by the trial judge within the periods prescribed by Rule 1100. Furthermore, the Commonwealth filed timely petitions for extension of the time under Rule 1100, and the Court granted Commonwealth's petitions because of Commonwealth's diligence in prosecution.

The criminal complaint in the above-captioned case was filed January 4, 1980, and the case was called for

trial on June 2, 1980. This is well within the 180-day period. On June 3, 1980, upon motion of Defendant, a mistrial was granted because of extensive pre-trial publicity. The Defendant's Motion for Change of Venue was granted, and the trial judge immediately requested the Pennsylvania Supreme Court for a designation of a county from which a foreign jury would be selected. This procedure is rather extensive and time-consuming. In spite of the complicated and lengthy procedure, the above-captioned case was again called for trial on September 3, 1980, in Dauphin County. The calling of the case for trial on September 3, 1980, was well within the time prescribed by Rule 1100. After approximately ten days of jury selection, Defendants again made a motion for mistrial because a newspaper article mentioning the other three mur-

ders was circulated in the jury assemblage area. On September 12, 1980, the Court again granted Defendants' Motion for a mistrial.

After the granting of the mistrial on September 12, 1980, trial judge again requested the Supreme Court of Pennsylvania to designate a county from which a foreign jury would be selected. After an extensive and time-consuming procedure, the trial judge called the case for trial in Berks County on January 5, 1981. Again the case was called for trial within the period prescribed by Rule 1100.

Even though it is not necessary, many of the days within the above-mentioned periods were excludable because of the Defendant being involved in other judicial proceedings, thus being unavailable. Even though it was un-

necessary, the Commonwealth also obtained extensions under Rule 1100.

The Defendant's brief contends that Judge Earl S. Keim abused his discretion in refusing Defendant's initial motion for change of venue; thus causing a violation of Defendant's right to a speedy trial and, in particular, a violation of Rule 1100 of the Pennsylvania Rules of Criminal Procedure. This assertion is totally absurd. Judge Keim received extensive evidence on Defendant's motion and considered the lapse of over six months between the date of the killings and the date of jury selection. Unfortunately, Judge Keim did not have the advantage of hindsight. The only delay caused by Judge Keim's decision was two days, June 2 and June 3, 1980. Certainly this two-day delay did not prejudice the Defendant, especially since Rule 1100 was not violated. Even

though unnecessary, the Commonwealth obtained extensions of Rule 1100. Even though the Defendant was occupied in other judicial proceedings and, therefore, was unavailable for trial of the Miller case, the Miller case was called for trial within the 180-day period designated by Rule 1100. The Defendant's case was called for a pre-trial on May 30, 1980; and the jury selection was commenced on June 2, 1980. This was well within the 180-day period prescribed by Rule 1100. At request of Defendant, a mistrial was granted on June 3, 1980. On June 11, 1980, Judge Ackerman granted a motion to extend Rule 1100. Irrespective of this extension, the second trial in the Miller case was commenced within 120 days of the mistrial. The case was called for trial and jury selection was commenced on September 3, 1981 in Dauphin County.

The time period of 120 days set forth in Rule 1100(e) applies to trials following mistrial as it applies to those following post-verdict motions or appeals (Comm. v. Manley, 421 A.2d 636 [1980])

For the second time, Defendant's motion for mistrial was granted during the jury selection process in Dauphin County. The motion for mistrial was granted on September 12, 1980. Immediately thereafter the trial judge notified the Supreme Court and requested designation of another county from which a foreign jury would be selected. On January 5, 1981, this case was again called for trial, and jury selection process commenced in Berks County.

The docket entries will establish that many days between September 12, 1980 and January 5, 1981 were utilized for other judicial activities involving

the Defendant. These must be excluded from the 120-day period after the mistrial of September 12, 1980 because the Defendant was unavailable for trial. Irrespective of these excludable days, this case was called for trial within the 120 days prescribed by Rule 1100.

This case and the other cases involving the Defendant totally dominated the Westmoreland County Court Calendar for approximately two years. The Defendant's right to a speedy trial has not been violated. This case was brought to trial within the time limits prescribed by Rule 1100.

To obtain a proper perspective of Commonwealth's diligence in prosecuting Defendant in the above-captioned case, one must understand that the Defendant and Michael Travaglia were charged with committing four murders and several robberies. These crimes were committed

between December 27, 1979 and January 3, 1980. These cases totally dominated the judicial proceedings in Westmoreland County. A review of some of the procedural events relating to these cases will definitely establish Commonwealth's diligence in concluding these cases. It is also to be noted that one of the murders, namely that of William Nichols, occurred, and was handled, in Indiana County, Pennsylvania. The other three murders occurred, and were handled, in Westmoreland County. The important procedural events occurring between the Defendant's arrest and the conclusion of the trial in the above-captioned case are as follows:

January 3, 1980:	Defendant arrested with co-actor, Travaglia. Committed to Westmoreland County Detention Center

January 4, 1980:	Complaint filed in the Miller homicide
January 10, 1980:	Magistrate's hearing on other homicide charges continued so as to allow the appointment of counsel for Lesko. (Public Defender's Office could not represent him because of conflict in representing co-defendant, Travaglia.)
January 15, 1980:	President Judge Keim appoints Rabe F. Marsh, Esq., counsel for Lesko.
January 21, 1980:	Counsel appointed for defendant in Indiana County because of conflict with Indiana County Public Defender representing co-actor, Travaglia
January 22, 1980:	Hearing before Judge Keim on Defendant's motion to close Magistrate's hearing to public. Motion denied.
January 22 to 24, 1980:	Magistrate's Preliminary Hearing on all three homicide cases

January 22 to 24, 1980: (continued)	and several robbery charges.
January 28, 1980:	Hearing in Indiana County on Defendant's pre-trial motions
January 30, 1980:	At Defendant's request, Court appoints a psychiatrist to examine him
February 5, 1980:	Defendant transported to Indiana County for hearing before Magistrate
February 8, 1980:	Defendant arraigned before Judge Mihalich; pleads not guilty
February 14, 1980:	Defendant arraigned in Indiana County on Nichols homicide; pleads not guilty
February 19, 1980:	Defendant transported to Pittsburgh for psychological testing
February 26, 1980:	Preliminary Attorney's Conference held in Westmoreland County pursuant to local rules
March 10, 1980:	Defendant's motion granted allowing him thirty more days to file omnibus pretrial motions

March 25, 1980:	Defendant granted leave to retain another psychiatrist to aid in defense
April 9, 1980:	Omnibus pre-trial motion, including change of venue motion filed. Notice of insanity defense filed
April 11, 1980:	Motion for closed suppression hearing filed
April 14, 1980:	Hearing held before President Judge Keim on motion to close suppression hearing, to quash informations, to change venue, and Commonwealth's petition to consolidate case with that of co-actor, Travaglia. Hearing continued for additional information and to await ruling of Supreme Court in Hayes case, regarding closure of suppression hearing.
April 24, 1980:	Pre-trial hearing in Indiana County on Nichols homicide
April 28, 1980:	Continuation of suppression hearing in Indiana County

May 12 to 13, 1980:	Continuation of April 14, 1980 hearing before Judge Keim; additional testimony taken on defendants' motions. Court requested briefs within five days
May 19, 1980:	Defendant pleads guilty to homicide charge in Indiana County after jury selected
May 30, 1980:	President Judge Keim issues opinion and order denying motion to quash information, denying motion for severance, denying motion for change of venue and denying motion to close suppression hearing to public; granted Commonwealth's petition to consolidate charges
May 30, 1980:	Pre-trial conference set by Judge Mihalich in Miller homicide cases
June 2 to 3, 1980:	Miller homicide case called for trial before Judge Mihalich; mistrial granted because of prejudicial pre-trial publicity

June 3, 1980:	Request made by Judge Mihalich of Supreme Court for order changing venire to another county in Miller homicide case
June 11, 1980:	Hearing on Commonwealth's motion to extend Rule 1100 before Judge Ackerman; motion granted and trial date set for no later than September 19, 1980
June 23, 1980:	Order of Supreme Court naming Dauphin County as place of jury selection in Miller homicide case
June 26, 1980:	Motion filed by Defendant at No. 681 C 1980 in opposition to proceeding in August, 1980 because of unavailability of expert witnesses; motion indicates that Judge Mihalich was contemplating commencement of Miller homicide trial in August
June 30, 1980:	Rehearing of Commonwealth's petition to extend time before Judge Ackerman; time to extended to September 8, 1980

July 18, 1980:	Judge Mihalich, presiding over Miller homicide case, files order setting September 3, 1980 as date for commencement of that trial in Dauphin County after consultation with President Judge in Dauphin County regarding logistics and time needed for calling jurors
August 29, 1980:	Hearing before Judge Ackerman on Commonwealth's motion to extend Rule 1100; granted to October 6, 1980
September 3, 1980:	Jury selection begins in Dauphin County in Miller homicide case
September 3 thru September 12, 1980:	Jury selection continues in Dauphin County in Miller homicide case
September 12, 1980:	Defense motion for mistrial granted in Dauphin County in Miller homicide case when jurors learned that defendants were charged with other homicides

September 16, 1980:	Judge Mihalich requests Supreme Court to designate another county for jury selection in Miller homicide case
September 18 thru September 30, 1980:	Suppression hearing before Judge Ackerman in all three homicide cases (Miller, Levato and Newcomer) and allied robbery cases
September 19, 1980:	Levato homicide case assigned to Judge Loughran; Newcomer case assigned to Judge Hudock
September 30, 1980:	Defense counsel requests delay in suppression hearing so as to allow introduction of more evidence
October 3, 1980:	Judge Ackerman issues order on suppression motions
October 3, 1980:	Joint hearing on Commonwealth's petition to extend Rule 1100 held before Judges Loughran and Hudock; extension granted in Newcomer case by Judge Hudock until November 10, 1980

October 3, 1980:	At joint hearing, Defendants renewed request for change of venue in Levato and Newcomer homicide cases; motions granted by Judge Hudock and Judge Loughran
October 3, 1980:	Request made of Supreme Court to designate county of jury selection in Levato and Newcomer homicide cases by Judges Hudock and Loughran
October 9, 1980:	Supreme Court designates Berks County as place of jury selection in Miller Homicide case
October 22, 1980:	Orders received from Supreme Court by Judges Hudock and Loughran designating Montgomery County as the place of jury selection in the Levato homicide case and Delaware County as place of jury selection in Newcomer homicide case
October 31, 1980:	Defendants Lesko and Travaglia, in joint hearing before Judge Loughran and Hudock,

October 31, 1980: (continued)	agree to waive Rule 1100 from that date until March 2, 1981 so as to allow the trial of Miller homicide case to proceed
January 5 thru February 3, 1981:	Trial of Miller homicide case; Defendants Lesko and Travaglia tried jointly and sentenced to death by jury.

For the above-mentioned reasons, the Defendant's Motion in Arrest of Judgment is denied.

* * * * *

In accordance with the foregoing Opinion, the Court issues the Order dated and filed of even date herewith.

Dated: April 5, 1982

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN CHARLES LESKO

No. 681 C 1980

BEFORE: Gilfert M. Mihalich, J.
Joseph A. Hudock, J.
Daniel J. Ackerman, J.

COURT EN BANC

ORDER OF COURT

AND NOW, to wit, this 5th day of April, 1982, in accordance with the Opinion dated and filed of even date herewith, it is hereby ORDERED, ADJUDGED and DECREED that the Motion for New Trial and Motion in Arrest of Judgment filed by the Defendant, John Charles Lesko, are denied.

It is further directed that Defendant, John Charles Lesko, appear before

Judge Gilfert M. Mihalich for sentencing on Friday, the 23rd day of April, 1982 at 1:00 o'clock P.M.

BY THE COURT:

/s/ Gilfert M. Mihalich, J.
Gilfert M. Mihalich, Judge

CONCURRING:

/s/ Joseph A. Hudock, J.
Joseph A. Hudock, Judge

_____
Daniel J. Ackerman, Judge

(See Dissenting Opinion attached to this Court's Opinion)

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN CHARLES LESKO

No. 681 C 1980

OPINION

ACKERMAN, J., dissenting:

I respectfully dissent. Every conceivable effort was made by the trial court to insure that the jurors chosen in this case would come to the jury box without knowledge of the defendant's other bloody deeds. To insure such an impartial jury the court granted two mistrials during the jury selection process and went three-fourths of the way across the state to gather a jury from veniremen unaware that the defendant had

pled guilty to one murder and was charged with two others.

The Commonwealth's principal witness at trial was Ricky Rutherford who was in the car with Lesko and his co-defendant Travaglia when the crime took place, and observed Travaglia fire the fatal shots into Officer Miller. Prior to Rutherford's testimony, the Commonwealth advised defense counsel and the court that it intended to question Rutherford concerning the murder of William Nichols in Indiana County, a crime also committed by Lesko and Travaglia and observed by Rutherford several hours prior to the Miller homicide. The defendant's counsel objected to the introduction of evidence concerning the prior crime. The rule precluding the introduction of evidence of crimes other than those on which the defendant stands presently accused, and the legitimate exceptions to

this rule are well documented.

> "[3] The general rule is that the Commonwealth may not introduce evidence of a crime that is distinct from the crime for which the defendant is being tried. Commonwealth v. Fuller, 479 Pa. 353, 388 A.2d 693 (1978); Commonwealth v. Terry, 462 Pa. 595, 342 A.2d 92 (1975); Commonwealth v. Groce, 452 Pa. 15, 303 A.2d 917 (1973); Commonwealth v. Peterson, 453 Pa. 187, 307 A.2d 264 (1973) (plurality opinion); Commonwealth v. Wable, 382 Pa. 80, 114 A.2d 334 (1955); Commonwealth v. Bastone, 262 Pa.Super. 590, 396 A.2d 1327 (1979); Commonwealth v. Bond, 261 Pa.Super. 311, 396 A.2d 414 (1978). This rule is an application of the principle that prohibits the initial introduction by the prosecutor of evidence of bad character.
>
> > '[C]haracter is never an issue in a criminal prosecution unless the defendant chooses to make it one (Wigmore, evidence, vol. 1, Sections 55, 192). In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the bar....The principle...is one, not of logic, but of policy (Wigmore, vol. 1, Sections 57, 194; People v.

Richardson, 222 N.Y. 103, 109, 110, 118 N.E. 514). There may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of a milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime. 'The natural and inevitable tendency of the tribunalwhether judge or jury-is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.' (Wigmore Evi- dence, vol. 1, Section 194, and cases cited). People v. Zackowitz, 254 N.Y. 192, 197, 172 N.E. 466, 468 (1939) (CARDOZO, J.)

'[4] It is often said that there are exceptions to this general rule, and that evidence of a distinct crime may be admitted when it tends to prove

> (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other than proof of one tends to prove the others; or (5) to establish the identity of the persons charged with commission of the crime on trial - in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other. Commonwealth v. Peterson, supra, 453 Pa. at 197-98, 307 A.2d at 269." Commonwealth v. Rozanski, Pa.Super. 433 A.2d 1382, 1386 (1981).

The fact that the defendant had recently committed a homicide in Indiana County and had stolen the victim's car was admissible to negate the claim of the co-defendant Travaglia that the shooting of Officer Miller was acci-

dental.[1]

If the examination of Rutherford had been left to a recitation that he and the defendants were in a stolen car and that the defendants had participated in a homicide in an adjoining county hours

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[1]I do not agree that the facts support the conclusion that the Miller homicide was part of the same transaction as the Nichols' homicide. In Commonwealth v. Brown, Pa. 342 A.2d 84 (1981) relied on by the majority, the jury was permitted to hear that the defendant after committing a robbery escaped apprehension by entering a house and taking as hostages the occupants who became the victims of robbery, rape and murder. The majority concludes that Officer Miller was killed while the defendants were leaving the scene of the Nichols' murder. The majority, I believe, would agree that the defendants, after murdering Mr. Nichols, drove around for a while, went to Travaglia's father's home and stole a gun; left, returned to steal the correct ammunition, and drive to Apollo intending to rob a store (see majority opinion, p. 64). Seeing Officer Miller parked in his patrol car, they drove by him three times speeding and honking their horn finally luring him into fatal pursuit (volume 1, 368-374). The homicides seem to me to be separate and distinct acts of random violence.

before, I would have no difficulty in concurring with my colleagues on the court en banc. Before Rutherford's testimony began, however, the defendant's counsel made a motion in limine asking the court to limit the witness' testimony to the fact that the car was stolen and its owner killed without recitation of the "lurid details" (volume 1, 320-320). The motion was denied, and it is at this juncture that my opinion parts company with that of my learned colleagues. As indicated above, evidence of other crimes may be admissible for certain purposes; but only if the probative worth of this evidence outweighs the tendency to prejudice the jury. Commonwealth v. Morris, Pa. 425 A.2d 715, 720 (1981). Quoting McCormick on Evidence, Section 190 at 453-55 (2d ed. E. Cleary 1972),

the Superior Court stated recently:

> "some of the wiser opinions (especially recent ones) recognize that the problem is not merely one of pigeonholing but one of balancing....
>
> '[Thus the trial judge should] exclude the other-crimes evidence, even where it has substantial independent relevancy, if in his judgment its probative value for this purpose is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial." Commonwealth v. Rozanski, supra, at 386-7.

After reading Rutherford's testimony before the jury, I am constrained to conclude that its prejudicial impact outweighed its probative evidentiary value. The horrible events pertaining to the Nichols' murder laid before the jury can be summarized as follows.

On the evening of January 2nd, 1980, Michael Travaglia abducted William Nichols, a complete stranger, from the

Edison Hotel bar and in the company of Rutherford and Lesko, forced Mr. Nichols to drive them out of the city of Pittsburgh in Nichols' car. Upon entering the car and before leaving the city Travaglia produced a gun and shot Mr. Nichols in the arm (volume 1, 351). The desperate Nichols kept pleading "what are you going to do to me?" (volume 1, 354). After traveling some distance, he was then handcuffed and placed in the back seat of the automobile and as they drove on, the defendant repeatedly punched the wounded and bound man in the face with his fists, taunting him with a knife, calling him a "queer" and asking him if he wanted to perform deviate sexual acts (volume 1, 356). The driver, now Travaglia, would on occasion slow down the car and turn around and punch the victim in the back seat Rutherford continued to describe Mr.

Nichols' torment. "Well, we drove around for a while, and John was hitting the man, and the jury would ask him to stop, and he wouldn't stop. And he would tell the man to talk with a deeper voice, because at the time his voice was high pitched. And then when the would try, he'd laugh and hit him again." (volume 1, 357). The victim eventually slipped into unconsciousness. His scarf was cut in half with part of it stuffed into his mouth and part tied around his head as a gag (volume 1, 358). The car by then had been stopped in a wooded area by a frozen lake. The victim's personal belongings were put into the glove compartment and he is hauled out of the car still handcuffed and his feet were bound with a belt (volume 1, 360). After locating a rock to use as a weight (volume 1, 359), the defendants dragged Mr. Nichols across the edge of the

frozen lake to a hole that they had broken in the ice (volume 1, 364). While Rutherford did not see Nichols entering the water, as they drove from the scene, Travaglia tersely commented on Mr. Nichols fate, "he came back up one time, and was coughing, and went back down under," he said (volume 1, 367).

All homicides are grim and juries are entailed to know all of the relevant facts pertaining to the particular case that they are sworn to hear, but to expect jurors or anyone else to consume the loathsome scenario described above pertaining to a completely different crime without feeling revulsion, passion and hatred for the perpetrators because of it, is contrary to my view of human nature. In addition, armed with the confessions of the defendants and an eye witness to the Miller homicide, it would

seem to have been unnecessary.[2]

The details of how Mr. Nichols was shot, kidnapped, robbed and tortured before he was thrown alive into a frozen lake would, in my opinion, cause a bias in the most devoted juror and standing alone would negate the presumption of innocence. The defendants, no matter how monstrous, had a right to be tried by a jury unmoved by the details of another separate ghastly crime. Accord-

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[2]As indicated, the evidence of the Nichols' homicide negates the co-defendant's theory of accident, but a theory that was also clearly negated by the uncontroverted fact that the officer was shot twice. See Commonwealth v. Wright, Pa.Super. 393 A.2d 833, 836 (1978), which states that courts must balance on one side the actual need for other-crimes evidence in light of the issues and the other evidence available to the prosecution.

ingly, I would reluctantly grant the defendant's motion for a new trial.

s/ Daniel J. Ackerman
Daniel J. Ackerman, Judge

ORIGINAL

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NO. 90-1880

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

JOHN CHARLES LESKO,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

1. Respondent, John Charles Lesko, is indigent. He has previously sought and obtained leave to proceed in forma pauperis in both the federal district for the Western District of Pennsylvania and the Third Circuit Court of Appeals.

2. Respondents' attorneys, Rabe F. Marsh, III, Esq. and Welsh S. White, Esq. were appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(d)(6), as amended, by Judge Alan N. Bloch of the Western District of Pennsylvania.

WHEREFORE, Respondent prays that this Court grant him leave to proceed in forma pauperis.

Respectfully submitted,

Welsh S. White

Welsh S. White
Attorney for Respondent

NO. 90-1880

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

JOHN CHARLES LESKO,

Respondent

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Third Circuit deviated from established Fifth Amendment case law in holding that the prosecutor's comment on respondent's failure to testify about the crime at his capital penalty trial was constitutionally impermissible?

II. Whether the Third Circuit's application of these established principles to the particular facts of respondent's case constituted a "new rule" within the meaning of Teague v. Lane, 489 U.S. 288 (1989)?

III. A. Whether the Third Circuit erred in rejecting the Pennsylvania Supreme Court's legal conclusion that the prosecutor's penalty-trial arguments were federally constitutional?

III. B. Whether the Third Circuit erred in concluding that, on the facts of record, the prosecutor's closing arguments rendered the respondent's penalty trial fundamentally unfair?

IV. Whether the Third Circuit erred in holding that an evidentiary hearing was required to resolve respondent's claim that the use of a prior guilty plea as evidence in aggravation at his penalty trial was unconstitutional because that plea was entered as a result of a plea

agreement which induced respondent to believe that such use was specifically forbidden?

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STATEMENT OF THE CASE

Respondent and Michael Travaglia were charged in Westmoreland County, Pennsylvania, with the first degree murder of a police officer, Leonard Miller, on January 3, 1980. Travaglia had shot Officer Miller twice from close range with a .38 caliber handgun after Officer Miller stopped a car driven by Travaglia in which respondent and another man, Ricky Rutherford, were passengers.

Prior to their joint trial in Westmoreland County, respondent and Travaglia each entered guilty pleas to second degree murder charges in Indiana County, Pennsylvania, involving the earlier killing of William Nichols.

Respondent did not testify at the guilt phase of his Westmoreland County trial. Based on respondent's statement to the police some time after the crime, respondent's trial attorney argued that respondent had not contemplated the killing of Officer Miller and, therefore, was at most guilty of second degree murder on the basis of Pennsylvania's felony-murder rule. The jury nevertheless found both respondent and Travaglia guilty of first degree murder.

At the sentencing hearing which followed, the prosecutor introduced respondent's Indiana County guilty plea as an aggravating factor. Respondent objected to this evidence on the ground that, under his plea agreement with the District Attorney of Indiana County, the plea was entered there with the express understanding that it would not be introduced into evidence at the Westmoreland County trial. Respondent requested, but was

denied, an opportunity to establish the facts relating to this plea agreement.

During the penalty phase of his trial, respondent testified for the limited purpose of describing his deprived childhood. Respondent's counsel introduced this evidence for the purpose of establishing a mitigating circumstance relating to respondent's personal background. The prosecutor did not cross-examine.

During his closing penalty argument, the prosecutor focused on respondent's failure to admit his crime during his penalty trial testimony. He said,

> And I want you to consider that. John Lesko took the witness stand, and you've got to consider his arrogance. He told you how rough it was, how he lived in hell, and he didn't even have the common decency to say I'm sorry for what I did. I don't want you to put me to death, but I'm not even going to say that I'm sorry. Tr. at 1697.

In addition, the prosecutor stated that he could not stop the jury from showing sympathy to the defendants and continued:

> So I'll say this: Show them sympathy. If you feel that way, be sympathetic. Exhibit the same sympathy that was exhibited by these men on January 3rd, 1980. No more. No more.
>
> I want you to remember this: We have a death penalty for a reason. Right now, the score is John Lesko and Michael Travaglia two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's your duty. Tr. at 1701-02.

Both of these arguments were objected to by respondent. The trial judge overruled both objections. In his jury instructions, he told the jurors that their decision should not be based on sympathy. The jury returned a sentence of death for

respondent, finding that the aggravating circumstances outweighed the mitigating circumstances.

After respondent was sentenced to death for his part in the murder of Officer Miller, John Armstrong, respondent's Indiana County attorney, moved to withdraw respondent's Indiana County guilty plea on the ground that the underlying plea agreement had been breached when the plea was introduced as an aggravating circumstance in the penalty phase of the Westmoreland County trial. At a hearing on the motion to withdraw the plea, Armstrong presented no testimony but made a statement to the court. Armstrong stated that the introduction of the Indiana County guilty plea in the Westmoreland County capital trial violated the plea agreement because the essence of the agreement was that the plea was not to be introduced at that trial. The District Attorney of Indiana County then testified that he never promised anyone that the Indiana County guilty plea would not be used in the Westmoreland County trial. The Indiana County Court denied the motion to withdraw respondent's guilty plea. It limited its consideration of the plea agreement to the terms expressly stated in the plea colloquy, and it found that these terms did not overtly include any promise of non-use of the plea in Westmoreland County. On appeal, the Pennsylvania Supreme Court affirmed, adopting similar reasoning.

The Pennsylvania Supreme Court also affirmed respondent's Westmoreland County conviction and death sentence. Later, respondent filed a petition for post-conviction relief, asking the Westmoreland County court to hold a hearing on respondent's

claim that the introduction of his Indiana County guilty plea at the Westmoreland County penalty trial violated the terms of the Indiana County plea agreement. Although respondent had witnesses present to testify on these matters, the court refused to conduct a hearing. The Pennsylvania Supreme Court affirmed.

Petitioners accurately summarize the subsequent history of the case.

REASONS FOR DENYING THE WRIT

I. The Third Circuit's Application of Established Fifth Amendment Rules to the Particular Facts of This Case, in Which the Prosecutor Unmistakably Commented on the Respondent's Failure to Testify About the Crime at the Penalty Trial, Presents No Issue Warranting Certiorari

Petitioners frame their first issue as whether the prosecutor properly "comment[ed] on the defendant's failure to express remorse." Petition, Question Presented I. This enables them to manufacture a supposed conflict between the decision below and cases said to "have permitted a prosecutor's comment during the penalty phase on a defendant's lack of remorse." Petition, 42. But the Third Circuit explicitly did "not reach the broad question [posited by petitioners] of whether, and to what extent, a defendant's demeanor is relevant to the sentencing determination in a death penalty case, because . . . the prosecutor's comments in this case were [not] a simple reference to demeanor," Appendix, p. 37a; they were adverse comment on "Lesko's failure to testify about his role in the events surrounding the Miller homicide," id., pp. 37a-38a.[1]

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[1]Petitioners complain that the Third Circuit "rejected the state supreme court's determination that the 'no remorse' comment was a reference to Lesko's demeanor." Petition, p. 56. But this was perfectly proper and presents no issue for certiorari. The federal constitutionality of a prosecutor's arguments to the jury, like the federal constitutionality of a judge's instructions to the jury, depends on how the spoken words would be understood in context. That is not a factual question on which a federal habeas corpus court should defer to state-court fact-finding (see Part III.A infra); it is a classic question of judgment in the application of federal constitutional standards which a federal court must decide independently. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 516-17 (1979); Francis v. Franklin, 471 U.S. 307, 316 (1985); and see Yates v. Evatt, 59 U.S.L.W. 4509, 4512 (U.S., May 28, 1991.)

The thrust of the prosecutor's argument was that the jury should consider Lesko's "arrogance" in testifying about his background and not even having the "common decency to say I'm sorry for what I did." Appendix, 37a (emphasis supplied). As the Third Circuit indicated, "[t]o the jury, the natural and necessary interpretation of these comments would be that Lesko had a moral or legal obligation to address the charges against him -- indeed to apologize for his crimes -- during his penalty phase testimony, and that the jury could and should punish him for his failure to do so." Appendix, 37a. Thus, the issue presented by this record is whether the prosecutor violated the Fifth Amendment privilege by commenting on respondent's failure to testify about the crime at the penalty trial.

Properly understood, this Fifth Amendment issue is a narrow one. It concerns only the propriety of a prosecutor's asking the jury to base a death sentence partly upon "the defendant's failure to testify about the substance of the charges against him" when he takes the stand at a penalty trial for the limited purpose of relating his childhood history as a circumstance in mitigation. Appendix, 35a. Neither this nor any similar issue has produced conflicting decisions among the lower courts, despite petitioners' claim of such conflict.[2] Rather it is an issue that other courts have found no occasion to decide -- an

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[2]The cases cited by petitioners deal with prosecutorial argument about the defendant's lack of remorse, not about the defendant's failure to testify concerning the crime. In most of these cases, the prosecutor argued the defendant's lack of remorse on the basis of his "observable demeanor" at trial. See, e.g., State v. Price, 326 N.C. 56, 85, 388 S.E.2d 84, 100 (1990).

apt indication of its general lack of significance in the administration of capital trials.

Moreover, contrary to petitioners' assertion, the ruling below is not inconsistent with the applicable decisions of this Court. On the contrary, each aspect of the Third Circuit's analysis is solidly supported by this Court's decisions.

Under Griffin v. California, 380 U.S. 609 (1965), the prosecutor is barred by the Fifth Amendment from commenting on a defendant's failure to testify at trial. Griffin's rationale was that a prosecutor's comment imposes an impermissible burden on the defendant's exercise of his Fifth Amendment privilege.[3] In the present case, the Third Circuit properly asked, first, whether Griffin applied to respondent's penalty trial, and, second, whether respondent waived his Fifth Amendment protection by testifying for the limited purpose of explaining his background and personal history.

The Third Circuit read Estelle v. Smith, 451 U.S. 454 (1981), as holding that a capital defendant's Fifth Amendment privilege applies at the penalty stage. Plainly, this is correct. Although petitioners intimate that the determination of guilt diminishes the scope of the privilege, Petition, 45, this Court in Smith stated that it could

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[3]The Court has consistently "interpreted the Fifth Amendment guarantee against self-incrimination to mean that comment on the failure to testify was an unconstitutional burden on the basic right." United States v. Hasting, 461 U.S. 499, 507 (1983). See, e.g., Lakeside v. Oregon, 435 U.S. 333, 336-339 (1978); Jenkins v. Anderson, 447 U.S. 231, 235 (1980); Carter v. Kentucky, 450 U.S. 288, 297-301 (1981).

> discern no basis to distinguish between the guilt and penalty phases of the respondent's murder trial so far as the protection of the Fifth Amendment is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental guarantees. Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment. 451 U.S. at 462-63.[4]

The Third Circuit was equally correct in concluding that this Court's decisions establish that "a criminal defendant does not completely waive the Fifth Amendment privilege by testifying solely on collateral or preliminary matters." Appendix, 34a. In United States v. Nobles, 422 U.S. 225, 240 (1975), the Court stated the rule to be that a defendant who testifies in his own behalf waives his "Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination" (emphasis supplied). It has long been settled that a defendant who testifies as to a collateral matter retains his Fifth Amendment privilege with respect to matters not

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[4]Again, petitioners labor to portray a debate in the lower courts where none exists. Apparently, every court that has considered the question has accepted the principle that Griffin applies at the penalty stage of a capital case. See, e.g., People v. Taylor, 276 Cal. Rptr. 391, 404, 52 Cal. 3d 719, ___, 801 P.2d 1142, 1155 (1990); People v. Ramirez, 98 Ill. 2d 439, 75 Ill. Dec. 241, 457 N.E.2d 31 (1983), cert. denied, 481 U.S. 1053 (1987). Petitioners' assertion that State v. Jeffries, 105 Wash. 2d 398, 717 P.2d 722 (1986) "suggested" that Griffin may not apply at the penalty trial (Petition, 49) is incorrect. Jeffries found that a prosecutor's comment on a defendant's penalty trial testimony was not in violation of Griffin because the defendant was testifying as to the merits of the charge against him. See 717 P.2d at 732-33. The court thus clearly accepted the principle that Griffin applies at the penalty trial.

reasonably related to his testimony. E.g., Brown v. Walker, 161 U.S. 591, 597-598 (1896).

Simmons v. United States, 390 U.S. 377 (1968), and its progeny demonstrate the point. Simmons held that a defendant's testimony at a pretrial motion to suppress may not be admitted against him at trial. This holding, which has been reaffirmed by later decisions, see, e.g., Brown v. United States, 411 U.S. 223, 228 (1973); United States v. Salvucci, 448 U.S. 83, 89-90 (1980), recognized that a defendant must be permitted to present evidence in vindication of a distinct constitutional right without being required to waive his Fifth Amendment privilege. See, 390 U.S. at 976. Under the Eighth Amendment, a capital defendant has a constitutional right to introduce mitigating evidence unrelated to the crime at his penalty trial. See, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 393 (1987). In doing so, he does not waive the Fifth Amendment privilege except within the boundaries set by the time-honored rules of cross-examination -- that is, with respect to matters reasonably related to his penalty trial testimony. Thus, the Third Circuit's finding that respondent did not waive his Fifth Amendment protection under Griffin by testifying solely about his childhood history at the penalty trial was entirely consistent with this Court's decisions.

II. Petitioners' Suggestion That the Third Circuit Announced a "New Rule" Within the Meaning of Teague v. Lane, 489 U.S. 288 (1989), Does Not Merit Certiorari

The Third Circuit's holding on the Fifth Amendment issue did not announce a new rule but rather applied an established rule to a unique situation. As explained in the previous argument, Griffin v. California, 380 U.S. 609 (1965), established that the Fifth Amendment prohibits a prosecutor from commenting on a criminal defendant's failure to testify about the crime at trial, and Estelle v. Smith, 451 U.S. 454 (1981), established that the defendant's Fifth Amendment protection extends to the penalty stage of a capital case. Drawing upon these two established rules, the Third Circuit found that the Fifth Amendment privilege bars a prosecutor from commenting on a capital defendant's failure to testify about the crime at the penalty stage.

Petitioners confuse this reasoning from settled rules with the elaboration of a new rule. Petition, 52-53. But the two are not the same under the approach to retroactivity that Teague derived from Justice Harlan's Mackey and Desist opinions. See Teague v. Lane, 489 U.S. 288, 305-10 (1989), citing Mackey v. United States, 401 U.S. 667, 692 (1971) (separate opinion of Harlan, J.), and Desist v. United States, 394 U.S. 244, 256-57 (1969) (Harlan, J., dissenting). Under this approach, a new rule is not announced when a court "'simply applie[s] a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.'" Penry v. Lynaugh, 492 U.S. 302, 314 (1989), quoting from Mackey, supra, 401 U.S. at 695 (separate

opinion of Harlan, J.), quoting Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting). Moreover, in Penry v. Lynaugh, supra, and Saffle v. Parks, 110 S. Ct. 1257 (1990), this Court explicated the difference between announcing a new rule and applying an existing principle. It is unnecessary for the Court to revisit the subject in this case.

Here, Griffin had long established the Fifth Amendment principle that a prosecutor may not comment on a criminal defendant's failure to testify at trial. Griffin is consistently recognized as barring prosecutorial comment on a defendant's failure to testify about the charges against him when the defendant testifies to a collateral issue at trial. See, e.g., McGahee v. Massey, 667 F.2d 1357, 1363 (11th Cir. 1982) (dicta); Calloway v. Wainwright, 409 F.2d 59 (5th Cir. 1969), cert. denied, 395 U.S. 909 (1969) (holding). Once Estelle v. Smith held that there is "no basis to distinguish between the guilt and penalty phases of . . . [a] murder trial so far as the protection of the Fifth Amendment is concerned," 451 U.S. at 462, the application of Griffin to the situation of a defendant testifying to a collateral issue at his penalty trial became simply a matter of applying an established constitutional principle to a factually new but logically indistinguishable case.[5]

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[5]Petitioners' assertion that Tucker v. Francis, 723 F.2d 1504, 1509-10 (11th Cir. 1984), aff'd sub nom. Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986) "reject[ed] a similar challenge," Petition, p. 53, is inaccurate. As the Third Circuit stated: "The Tucker court held that because defendant had testified on the merits of the charge against him during the penalty phase, prosecutorial comment on defendant's failure to testify during the guilty phase was

III. A. The Question Whether a Federal Habeas Court Must Accept the State Supreme Court's Legal Conclusions Regarding a Federal Constitutional Claim Does Not Merit Certiorari

Petitioners object to the Third Circuit's reaching a different result than the Pennsylvania Supreme Court on the issue of whether the prosecutor's argument rendered respondent's penalty trial fundamentally unfair in violation of due process, despite the fact that both courts apparently applied the same legal standard. Petition, 56. Petitioners state that "[t]he role of the lower federal courts in administering the writ of habeas corpus is to protect basic rights. They do not sit to review the decisions of the state courts." Petition, 57.

It is, of course, true that the federal courts on habeas do not review all decisions of state courts. Nevertheless, it has been established since Brown v. Allen, 344 U.S. 443 (1953), that a federal habeas court must independently apply the correct constitutional standard to the historical facts underlying a federal constitutional claim. Although it is sometimes difficult to determine whether a particular issue is a legal question (or a mixed question of law and fact) as opposed to a factual question, see, e.g., Miller v. Fenton, 474 U.S. 104, 113-14 (1985), in habeas cases it is clear that "legal question[s] require independent federal determination." Miller v. Fenton, supra, at

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permissible. However, the court stated that, under Calloway, '[h]ad the appellant limited his presentence testimony to biographical mitigating factors this case might be susceptible of a 'collateral matter' or partial waiver limitation.' 723 F.2d at 1514 (emphasis added)." Appendix, 36a, n.15.

110. See also Mincey v. Arizona, 437 U.S. 385, 398 (1978); Haynes v. Washington, 373 U.S. 503, 515-16 (1963).

In the present case, the question whether the prosecutor's closing argument rendered the penalty trial fundamentally unfair is clearly a legal question. Petitioners do not contend otherwise. In deciding this question, the Third Circuit independently applied the correct constitutional standard to the prosecutor's words as recorded in the trial transcript. This unremarkable procedure provides no occasion "to reevaluate the role of the lower federal courts in reviewing the decisions of the state courts." Petition, 57.

III B. Petitioners Offer No Reason Why This Court Should Review the Third Circuit's Determination that the Prosecutor's Argument Rendered Respondent's Penalty Trial Fundamentally Unfair

The Third Circuit concluded that the prosecutor's closing argument was improper in two respects: first, the prosecutor's comment relating to respondent's failure to admit his guilt violated his Fifth Amendment privilege; second, the prosecutor's "appeal to vengeance," see Appendix, 29a, urged the jury to act upon matters that could not properly be considered as aggravating circumstances, and was "calculated to incite an unreasonable and retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence." Appendix, 40-41a. The court then concluded that in combination these two errors rendered respondent's penalty trial fundamentally unfair under

the standard articulated by this Court in Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974).

The Third Circuit's ruling was fact-specific. In reaching its decision, the court examined not only the precise language of the prosecutorial arguments but also the context in which they were made, see, Appendix, 28a-31a, 36a-42a, the trial judge's charge, Appendix, 43a-44a, and the nature and weight of the prosecution and defense evidence before the jury, Appendix, 43a. Because the Third Circuit's holding was so particularistic, its significance is limited to the case at bar.

Moreover, there are no other reasons why this Court should consider such a fact-bound issue. Except for pointing out that the Third Circuit and the Pennsylvania Supreme Court reached different results with respect to the same issue (a conflict which inevitably follows from the grant of the writ), petitioners do not even contend that the Third Circuit's ruling was in conflict with decisions by other federal or state courts or that it conflicts with the applicable decisions of this Court.

In fact, the Third Circuit's ruling is entirely consistent with those decisions. In Darden v. Wainwright, 477 U.S. 168 (1986), the Court considered a case in which the prosecutor made improper arguments during the guilt phase of a capital case. In holding that the argument did not render the proceedings fundamentally unfair under the standard of Donnelly v. DeChristoforo, supra, the Court emphasized that the prosecutor's argument did not "implicate other specific rights of the accused such as . . . the right to remain silent." 477 U.S. at 181-82.

The Court observed that much of the objectionable argument "was invited by or responsive to the opening summation by the defense." 477 U.S. at 182. In determining whether the argument rendered the proceedings fundamentally unfair, the Court examined the strength of the evidence against the defendant, the effect of defense counsel's closing argument, and the judge's charge. 477 U.S. at 182.

In concluding that the prosecutor's argument in the present case rendered the proceedings fundamentally unfair in violation of DeChristoforo, the Third Circuit found that the argument did violate the defendant's constitutional right to remain silent. See Appendix, 31-39a. The court concluded that the prosecutor's improper remarks were not invited by the defense. See Appendix, 39a, n.17. It closely examined the entire record, including the effect of the judge's charge. See Appendix, 43-44a. Thus, the Third Circuit meticulously applied the controlling decisions of this Court. It is unnecessary for the Court to review its decision.

IV. Certiorari Should Not Be Granted to Review the Third Circuit's Decision that the Current State of the Record Called for a Hearing on Respondent's Claim that his Indiana County Guilty Plea Was Induced by an Assurance that It Would Not Be Used Against Him in his Westmoreland County Trial

After delineating the complex history of the state court proceedings in this case, Appendix, 9a-16a, and carefully exploring the implications of those proceedings, Appendix, 25a-28a, the Third Circuit concluded that respondent was entitled to an evidentiary hearing on the question whether the use of his

Indiana County guilty plea in aggravation at the penalty phase of his capital trial violated due process because the plea had been induced by an agreement which assured respondent specifically against such use.

Petitioners argue that this ruling was incorrect because respondent "bypassed" an opportunity to present the proofs relevant to his claim "at the time of the hearing on his motion to withdraw his guilty plea" in Indiana County. Petition, 60. Thus, the record is said to present the issue of when a state defendant's deliberate bypassing of state procedures forfeits his right to a hearing in the federal courts. Petition, 61-62.

But the record does not, in fact, present that issue. Petitioners misconceive the basis on which the Third Circuit held that a hearing was necessary to resolve respondent's claim. The Third Circuit did not disregard the fact that respondent presented no evidence on his Indiana County motion to withdraw the guilty plea. It held simply that the hearing on the motion to withdraw the guilty plea made by respondent's Indiana County counsel did not address the due process claim raised by respondent's present counsel, and that this due process claim involved factual issues that could therefore not be resolved on prior counsel's motion to withdraw his guilty plea. Appendix, 27a.[6] Respondent subsequently sought to present evidence on his

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[6]The Third Circuit's conclusion on this point is hardly surprising. In considering respondent's motion to withdraw his guilty plea in Indiana County, the Indiana County court did not and could not address the question whether the Indiana County guilty plea could be properly admitted at respondent's capital trial in Westmoreland County. The questions whether a

due process claim in the Westmoreland County court, but that court refused to receive it. See Appendix, 15a.

The Third Circuit's ruling that an evidentiary hearing is required under these circumstances is based on its detailed analysis of the unique record of this case. In reaching its result, the Third Circuit diligently applied the criteria of Townsend v. Sain, 372 U.S. 293, 312 (1963), and 28 U.S.C. § 2254(d). It did not establish any new principles of law or reach a result that was even arguably inconsistent with that reached by any other federal court. Accordingly, no reason appears for this Court to review the Third Circuit's decision on the issue.

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defendant's guilty plea should be vacated and whether he is entitled to have the Commonwealth perform in accordance with the terms of a plea bargain are separate and distinct. See Santobello v. New York, 404 U.S. 257, 263 (1971). In addition, as the Third Circuit indicated, the motion filed by respondent's Indiana County counsel to withdraw his Indiana County plea did not raise the question whether the plea was "involuntary" because it was entered with a misunderstanding, based on Indiana County counsel's representations, that the plea agreement specifically forbade the plea to be introduced at the subsequent capital trial in Westmoreland County. See Appendix, 22a-25a, 27a.

CONCLUSION

For the foregoing reasons, certiori should be denied.

Respectfully submitted,

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NO. 90-1880

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

JOHN CHARLES LESKO,

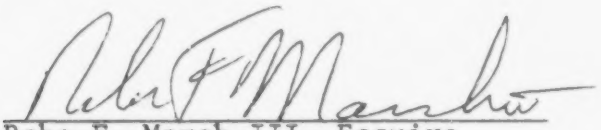
Respondent

CERTIFICATE OF SERVICE

I, Rabe F. Marsh III, Esquire, a member of the Bar of the Supreme Court of the United States, and appointed counsel for Respondent, do hereby certify that all parties required to be served have been served with a true copy of the within Motion for Leave to Proceed In Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, pursuant to Rule 29.3, by depositing on June 26, 1991, true and correct copies of said

documents in the United States Post Office at Greensburg, Pennsylvania, by first class mail, postage prepaid, addressed to counsel of record for Petitioners:

Robert A. Graci, Esquire
Chief Deputy Attorney General
Appeals and Legal Services Section
16 Strawberry Square
Harrisburg, PA 17120



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Dated: June 26, 1991

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JUNE 26, 1991

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Re: Joseph Lehman et al.
v. John Charles Lesko
No. 90-1880 In The Supreme
Court of the United States
Our File No. 07767.00006

Dear Sir:

Please find enclosed for filing the Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Also enclosed is respondent's Motion for Leave to Proceed In Forma Pauperis.

Lastly, I enclose the Certificate of Service that the Brief and Motion were served on counsel for petitioners.

Very truly yours,

Rabe F. Marsh III

RFM/cch
Enclosures

cc: (W/ENCLOSURES)
Robert A. Graci, Esquire